THE STATE AS A PARTY LITIGANT

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THE STATE AS A PARTY LITIGANT

BY

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PREFACE

This study is the outgrowth of a series of lectures on Political Theory by Professor W. W. Willoughby, and on Constitutional and International Law by President Goodnow, to both of whom grateful acknowledgement is made for their assistance and inspiration.

If the author has been rather free at times in his criticisms of the decisions of the various courts, this is not from any lack of respect for or failure to appreciate the weight due the opinions of those august bodies. But for his inability always to agree with the courts, the author offers no apologies: if his criticism is correct, no apology is needed; if unjustified, no amount of self-deprecation will add one iota to the validity of his judgment.

Special acknowledgement is made to Mr. Andrew H. Mettee, Librarian of the Baltimore Bar, for his courtesy in extending the privileges of the Bar Library to the author. Without this assistance the labor in the preparation of this work would have been considerably increased.

R. D. W.

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THE STATE AS A PARTY LITIGANT

CHAPTER I

History of the Doctrine of Non-Suability in England

That the State cannot be sued without its consent is a proposition now too well settled, at least in Anglo-American jurisprudence, to allow dispute. The origin or sources of this doctrine, its modifications and developments, and its effect when the State itself assumes the initiative and becomes a party plaintiff, are matters all of which are clouded in some degree of obscurity. The result of a long historic evolution, they are to a great extent incapable of reduction to exact rules, and are frequently difficult to justify or reconcile on any logical or rational basis. It is the purpose of this paper to examine, as far as possible by the instrumentality of adjudicated cases, these controverted questions of public law; it is the author's hope that by an exposition of these very inconsistencies and conflicts, the basis for a more rational solution of the problem will be laid.

The source from which the doctrine of the sovereign immunity has been derived is veiled in the shadows of antiquity. An attempt has been made, or more accurately, a suggestion has been offered, and often quoted, that the exemption of the state and government from legal responsibility may be traced to the Roman law.[1] There is reason to doubt, however, if a contemporary interpretation of Roman law would have justified the conclusion that even in legal theory the head of the state was exempt from legal responsibility; there is still stronger evidence to show that even if such a position were held by the head of the Roman state, the principles of law

[1] F. J. Goodnow, Comparative Administrative Law, vol. ii, pp. 149, 169, citing Mommsen, Römisches Staatsrecht.

on which this position was founded received a different interpretation in England, when the position of the king is considered.

The king of early Rome was limited morally by the consideration that he was first among equals; that fortune, and the practical necessity for some form of leadership had placed him where he was. Legally, he was limited by the fact that his function was the execution, not the formulation, of law, and that any deviation from the law not sanctioned by "the assembly of the people and the council of elders . . . was a null and tyrannical act carrying no legal effect." [2] The community was sovereign, though this sovereignty was ordinarily dormant.[3]

Law was not a command from the superior to the inferior, but "primarily a contract concluded between the constitutive powers of the state by address and counter-address . . ." [4] and, in spite of changes in form, as long as a Roman community existed, the consent of the sovereign, that is, of the community, was needed for any exceptional legislation.[5] "According to the best tradition the Roman people is the source of law." [6]

Although there is authority for holding that at the time of the compilation of the Corpus, this condition had changed and the emperor was considered above and outside of the State,[7] this change was then of such comparatively recent development that the influence of the old theory of the emperor as "a magistrate with limited and delegated powers" exercised a powerful if not controlling influence. It was under the older theory that most of the texts of the law were compiled,[8] so that the influence on other countries of the recent doctrine need not have been very pronounced.

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[2] Mommsen, History of Rome, ed. Dickson, vol. i, p. 100.
[3] Ibid, p. 110.
[4] Ibid, p. 111.
[5] Ibid. p. 122.
[6] A. J. H. Greenidge, The Legal Procedure of Cicero's Time, p. 23.
[7] Max Radin, Fundamental Concepts of the Roman Law, 12 California Law Review, 393.
[8] Ibid, 398.

Even the evidences found in the Digest and relied on as showing the theoretically absolute position of the emperor, are capable of another interpretation that weakens if it does not destroy the argument for absolutism. "What has pleased the king has the force of law"—*quod principi placuit habet legis vigorem* [9]—seems the most absolute of autocratic theories. But read in connection with its context, and especially with the concluding lines of the same sentence, it has no such meaning. The reason that what pleases the king has the force of law is not that it is the arbitrary will of the king, but "because by the lex regia which was passed concerning his rule, the people confided to him and conferred upon him all his dominion and power." [10] He exercises, then, not his own but a delegated power, whose vigor is in reality obtained not because it is his will, but because the people have entrusted the law-making power to him. The emperor received the empire by a law; therefore his decrees occupy the place of law—legis vicem.[11] The Code itself [12] speaks of the power of the Roman people being transferred to the emperor by a law.

The next phrase to be considered is *Princeps legibus solutus est,* "The king is freed from the laws." [13] When formulated, this had a precise, definite and limited meaning. The emperor was not freed from the laws, but in principle was subordinate to them. From the operation of certain laws, however, the emperor would by that particular law itself be exempted, because it was of a nature not applicable to the head of the state; an exemption within the power of the Senate to grant.[14]

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[9] Cooper's Justinian, p. 9, Lib. I, Tit. II, par. 6.
[10] Ibid.
[11] Muirhead, Institutes of Gaius, p. 3.
[12] Tissot, Code de Justinen, vol. i, p. 141; Code citation, I, 17, 1, 7.
[13] Kruger, Corpus Juris Civilis, Digest I, 3, I, 31.
[14] Cooper, op. cit. I, 2, 6; John M. Zane, A legal Heresy, Illinois Law Review, Dec. 1918-Jan. 1919, p. 443. The author cannot agree with all the conclusions in this article, but considers it an excellent historical discussion of the principle "Princeps Legibus Solutus est," with lengthy citation and discussion of authorities.

By the time of Vespasian, the custom had arisen to continue these exemptions for the successive emperors.

In addition to these immunities, special and legally enacted, the Emperor could obtain from the Senate, competent in this respect, dispensation of certain legal regulations. Then, and it is then a new phase of Roman law, already established at the time of Ulpian, it was admitted that the Emperor himself could accord dispensation of this character, and as he could, if such be the case, accord it to himself, it was now considered that such a personal exemption proceeded from himself (qu'une telle dispense pour lui-meme allait de soi); for greater simplicity he was considered as freed from the legal rules of which he could accord dispensation . . . . But this faculty applied only to regulations concerning private law, and, Mommsen adds, to police regulations. The emperor remained bound by the regulations (lois) concerning public and even criminal law, although by virtue of general principles no prosecution was possible against him during his incumbency.[15]

But, with the revival of learning and renewed study of the Roman law, these words were read as working a complete absolution from all laws, in a general manner, and the famous "Digna Vox"[16] to the effect that the Emperor should acknowledge himself bound by the laws, because upon them his authority itself depends, was interpreted by the Glossators to mean that the king was not bound by the laws, but might of his own accord submit to them.[17]

The emperor, then, was subject to law, in that his actions could be classed as legal or illegal, right or wrong according to their conformity to law; but he was, so long as he retained his position, exempt from prosecution, not because he could do no wrong, but because, while emperor, there was no forum in which he could be tried.

When we come to consider the condition of the early English kings, we find little direct evidence as to their exact position before the law; much is conjectural and disputed. There are insistent and repeated statements that at some early period, usually before Edward I (probably because from that time we have the beginnings of exact records) the

[15] A. Esmein, La Maxime Princeps Legibus Solutus Est Dans L'Ancien Droit Public Français, in Essays in Legal History (Oxford) 1913, pp. 201-202.

[16] Tissot, op. cit. p. 132, Code I, 14, 4.

[17] Esmein, op. cit. p. 203.

king was suable in the courts as an ordinary person. In the course of a suit brought in the reign of Edward I,[18] one of the counsel, Passeley, during the course of his argument, said:

> And on the other hand, in old times every writ, whether of right or of possession, lay well against the king, and nothing is now changed except that one must now sue against him by bill where formerly one sued by writ. . . .

To one who has examined the reports of cases in the Year Books, and is familiar with the heated and spirited manner in which argument was conducted, with the judges freely participating, the fact that this statement passed unchallenged is at least of high evidentiary value, if not of the existence of the old liability of the kings, as alleged, at least of the prevalence of the idea during later times.

In a later case, Wilby, Justice, in discussing the distinction between petition and traverse of office, said that he had seen an ordinary writ of praecipe addressed to King Henry.[19] In Fitzherbert's "Abridgement"[20] a slightly earlier case[21] was cited as sustaining the proposition that previous to the reign of Edward I the king was impleaded as a subject.

The proposition of the King commanding himself to appear before his own court is interesting, but the argument of counsel and the dictum of even a learned judge cannot carry great weight in such a matter. They have, however, often been cited and frequently relied upon. In the "Mirrour of Justices"[22] the claim is again made that before Edward I the king's courts were open to all classes of suits, and original writs could be obtained against the king as well as against any other person.[23] The same applied to writs and process

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[18] Year Book, 35 Edward I 468, 470.

[19] Ibid, 24 Edward III 55 b, cited in Brooks, "Peticion," part 12.

[20] Tit. Error, pl. 8.

[21] 22 Edward III 3 b. See also Allen on The Royal Prerogative, p. 190 ff., for a collection of the Year Book cases.

[22] The edition used is that of William C. Robinson. The authorities for and against the authenticity and value of the work are gathered in the editor's Introduction. Maitland attributes the book to Horn, circa 1290.

[23] Ibid, ch. 1, sec. 3, p. 25.

from the king's Chancery.[24] The "first and chief abusion" of which the writer accuses the king is that he holds himself above the law, instead of subject to it, as his oath requires.[25]

In an edition of Archbold, on Pleading and Evidence, published as late as 1838,[26] the statement is made without qualification or expression of doubt that "until the time of Edward I, the King might have been sued in all actions as a common person"; and the form of the writ is given.[27]

The difficulty with these 'authorities' is that they all place the time at an earlier period than that in which the proceeding giving rise to the assertion occurs, and so "play comparatively safe." They do seem to show there was a well sustained belief that in the good old days there was legal equality between king and subject; they at least negative the idea that the present position of immunity was the result of any logically apparent and irresistible theory.[28]

Some ground for this belief may be found in the fact that the King's claims were, in general, tried according to law.[29] For example, Henry III and the Prior of Kenilworth disputed as common persons in the courts over the question of seisin in certain land, each adducing proof to support his respective claim.[30] Again, the king had a controversy with an abbot over an advowson. The abbot admitted he could

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[24] Ibid, p. 24.

[25] Ibid, p. 231, where we also learn that "abusion is a disuse or a misuse of right usages turned to abuses, sometimes by contrariety and repugnancy to law, sometimes by too large a usage thereof."

[26] John F. Archbold, Pleading and Evidence, p. 5.

[27] To the same effect is "Sources of Roman Civil Law" (1857), by William Grapel, Professor of Jurisprudence, Presidency College, Calcutta, reproduced in Law Library, No. 75, * 49.

[28] An article by J. A. Lovatt-Fraser in 17 Law Quarterly Review, 252, "The Constitutional Position of the Scottish Monarch Prior to the Union," cites authorities to show that the mediaeval Scottish king was below Parliament, and far from irresponsible. Contemporary conditions in an adjacent country may have some weight as to the possibility of subjecting the English king to law; at least they show that the idea of an irresponsible head is not indispensable.

[29] Ludwick Ehrlich, Proceedings Against the Crown, 1216-1377, Oxford Studies in Social and Legal History, vol. vi, p. 12.

[30] Bracton's Note Book pl. 199, A. D. 1222.

not plead against the king, but he did trace good title; and the conclusion was "quod Dom. Rex nichil clamare potest, et ideo Abbas habeat seisinam suam etc." [31] A charter granted by the king to the men of St. Albans was later revoked by the courts, as having granted a privilege contrary to the common law.[32]

A consideration of the history of the times is enough, however, to convince one that the king could not be sued in his courts as a matter of right. The king was chief of the feudal system; he "was very like a feudal lord writ large. His powers were the powers of other feudal lords magnified." [33] His rights were "considered as differing from the rights of other men rather in degree than in kind." [34] His exemption from suit was not based on any idea that he could do no wrong; his was an exemption enjoyed by all other feudal lords in their own courts, but not in the king's [35]; it was simply a further application of the ordinary and generally accepted principle that no feudal lord could be sued in his own courts.[36] "It is part of the King's prerogatives, emanating from his position as the feudal chief of the country, as the ultimate landowner and lord of every man." [37]

That the king as chief of the feudal system had no court above him, in which he could be held liable, as the feudal lords could be in his, was the result rather of accident than theory.[38] This came, not from any "juristic necessity," but as a result of the practical working out of the feudal system; it was the logical result of that system, based as it was upon the "proprietary theory of the kingship." [39] The king's privileges were purely personal, and such as any natural

[31] Ibid., pl. 1732, A. D. 1226.
[32] Cited in full in Ehrlich, Appendix, p. 243.
[33] Holdsworth, History of English Law, 3 ed., vol. iii, p. 460.
[34] Pollock and Maitland, History of English Law (1895), vol. i, p. 496.
[35] Ehrlich, op. cit. p. 221.
[36] Holdworth, op. cit. p. 462.
[37] W. R. Bisschop, British Year Book of International Law, 1922-1923, p. 161.
[38] Pollock and Maitland, p. 502.
[39] Ibid. pp. 509, 510.

person was capable of enjoying and exercising;[40] he was not considered as endowed with any non-natural attributes.[41]

> The mediaeval king was every inch a king, but just for this reason he was every inch a man, and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity, or such powers as no mortal can wield.[42]

The kings of the thirteenth and fourteenth centuries lived "at a time when 'quod paribus placuit' rather than 'quod principi placuit' seemed to have the force of law. It is easy to see that this idea as to the position of law tended to give it an independence which was quite foreign to a body of law based upon Roman ideas or Austinian analysis."[43] It was true that the king was under no person, but under God; but to God and the law he should be subject, for he owed his position to the law, which made him king. No writs ran against him, but in the administration of justice he should be deemed as the least in his kingdom, as if he were an ordinary petitioner.[44]

There are other statements in Bracton, the most authoritative law writer of the times, and who, as judge in the King's courts, would not be likely to minimize the power of the master to whom he was responsible, and a man who was equally as unlikely to be led astray by mere groundless theories of responsibility, which show plainly the king was not considered as an unrestrained despot. If the king sought to reign "without a bridle, that is, without law," it would be the duty of the courts and barons to put a bridle upon him.[45]

Another passage is worthy of quotation at some length, for it shows that Bracton and the lawyers of that time fully realized the meaning of the phrase, "What has pleased the king has the force of law," and that the king's power was attributed to no such theoretical justification.

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[40] Ibid, p. 499.
[41] Ibid, p. 500.
[42] F. W. Maitland, Collected Papers, The Crown as a Corporation, vol. ii, p. 246.
[43] Holdsworth, vol. ii, p. 196.
[44] Bracton, De Legibus Angliae, f. 5 b. ed. Travers Twiss, 1878.
[45] Bracton, f. 34.

But for this purpose he has been created and elected, that he should do justice to all persons. . . . But he ought to surpass all his subjects in power. But he ought not to have a peer, much less a superior, chiefly in showing justice. . . . Although in receiving justice he may be compared to the least person within his kingdom. For the king can do nothing on earth, since he is the minister and vicar of God, except that which he may do of right, nor is that an objection which is said that the pleasure of the prince has the force of law (qui principi placet, legis habet vigore) for it follows at the end of the law with the Lex Regia, which is passed to grant him empire, to wit, not whatever is presumed rashly of the king's own will, but with the intention to make law, and that which has been rightly defined with the council of his magistrates, the king himself authorizing it, and deliberation and discussion having been had upon it.

Let him therefore temper his power by law, which is the bridle of power, that he live according to laws, because a human law has sanctioned that laws bind the lawgiver himself, and elsewhere in the same it is a saying worth the majesty of one who reigns, that the prince should avow himself to be bound by laws. . . . To law is owed his position as king (facit enim lex quod ipse sit rex).[46]

In another section, where the exact point discussed was a matter of ejectment, but the language used was with the intention, and broad enough to cover the king's acts generally, Bracton says there is no remedy against the king except by petition, unless it be as some say that for gross violations of the law the injured people need not wait for the ultimate judgment of the Lord, the Avenger, but the people can themselves have judgment upon him, "and may do it in the court of the king himself."[47] One of the most careful students of English law does not feel this to have been an idle statement, made as it was at a time when problems of sovereignty had not been conceived.[48]

That the king was a fallible human being was clearly recognized. In a contest between a grantee of the king, the latter having disseised a man because he had refused to furnish dinner for the king's huntsmen, and a claimant under the disseissee, the jury found that because of this disseisin the king's grantee had no claim.[49] Again in a case before the coram rege it was found that the king had disseised a

[46] Ibid, f. 107 b.
[47] Ibid, f. 171 b.
[48] Holdsworth, vol. ii, p. 256.
[49] Bracton's Note Book, pl. 769, A. D. 1233.

man 'without summons and upon his own will.' Verdict of restoration was given, the mesne tenant to render an accounting.[50] In still a third case, disseisin by the king was made the ground of action against the present occupant, claiming under the king.[51] These were collateral actions; in each, the act of the king was recognized as contrary to law, invalid, and conferring no rights upon any one claiming by virtue of this wrongful act; the king himself, however, because of his position, could not be made answerable, for there was no competent forum.

The king could not be vouched to warranty;[52] such would render him liable to suit, but he was still within the law; the oath of his counsellors bound them to him only so far as their actions in aiding him would not do wrong.[53] The king could waive his immunity; manifestly if he had done no wrong in the first place, there could be nothing as to which immunity could be waived. This waiver constituted not a creation of a cause of action, but a removal of the bar to prosecution. When he sued in his own right as a plaintiff, he had no greater advantage than others.[54]

The king could die[55] and could be under age[56] and provisions were made by law in at least one case, that of Henry IV, for his correction by chastisement.[57] The early king's exemption from suit, then, was personal, and due to the actual and obvious fact that he was one individual at the head of other individuals. He was fallible and could do wrong, but because the highest courts were his courts, in which at first in fact and later in theory he sat in person and dispensed (or dispensed with) justice, he was not answerable before them.[58]

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[50] Ibid, pl. 1106, A. D. 1234-1235.
[51] Ibid, pl. 1108, A. D. 1235-1236.
[52] Year Book, 30-31 Edward I, 99.
[53] Statutes of the Realm, i, 248.
[54] Year Book, 43 Edward III, 14.
[55] Holdsworth, iii, 463.
[56] Ibid, 464.
[57] Ibid, 465.
[58] Ehrlich, p. 24.

How then, from the position of personal exemption, was the idea of state exemption derived?[59] The following is offered as a reasonable hypothesis. With the downfall of the feudal system and the growth of the idea of the modern state, the old restraints upon the king vanished. The king himself became the state.[60] The king retained the powers he had held before by virtue of his position at the apex of the feudal pyramid; he then became the head of the Church also, and combined Divine attributes with temporal authority.[61] At about this time doctrines of sovereignty appeared. Bodin, generalizing from the facts of his day, offered an explanation of existing facts in scientific form.[62] He made the "Sovereignty of the ruler the essence of the State."[63] "The personality of the corporate body is concentrated in and absorbed by the personality of its monarchical head,"[64] after which "we are plunged into talk about kings who do not die, who are never under age, who are ubiquitous, who do no wrong and (says Blackstone) think no wrong; and such talk has not been innocuous."[65]

Even after actual power passed from the king, this idea of immunity was retained by the body politic, was kept by the state with a democratic as opposed to the state with an autocratic head. Perhaps this retention was from a failure or an unwillingness to recognize the fact that power, though still exercised in the name of one, had passed to the many, who as individuals had no, and who as a group need have no, special standing before the law. They were subject to the law in private relations where the king had not been; they could have been subject to the law when acting in a sovereign capacity. But this personal power was masked behind the still retained fiction of the sovereignty of the king, and the

[59] Cf. Tirard, Responsabilité de la Puissance Publique, Paris, 1906, pp. 2, 3.
[60] Holdsworth, iii, 468, iv, 192.
[61] Ibid, iv, 200.
[62] Ibid, 193, 196.
[63] Ibid, 194.
[64] Maitland, ii, 248.
[65] Ibid, 251-252.

theory, reiterated as late as 1921, that the courts are the king's courts.[66]

Perhaps it may be urged that such irresponsibility was deliberately desired for convenience, or as the result of theorizing; probably it was retained from habit, as a convenient, if unjust, method of freeing the exercise of power from its ordinary liability, by using a mistaken conception of the reason for the unique position held by the king, based actually on essentially reasonable facts, but now fortified and buttressed by new theories, historically inaccurate. The king was maintained as the titular head of the state; and state irresponsibility (really collective irresponsibility) was hidden behind the flimsy veil of the king's personal,[67] ancient, not to say antiquated prerogative. So government is carried on in the name of the king, and endowed with his formerly personal privileges.

Blackstone seems to recognize the argument ab inconvienti as the basis for the retention of the doctrine of immunity. It is submitted that good sense, and a close approximation to accuracy as to the real source of the doctrine of state immunity will be attained if in the following quotations, we substitute "state" for "monarch," "prince" and "royal." Speaking of the royal prerogative, he says:

> It was ranked among the arcana imperii: and, like the mysteries of the bona dea, was not suffered to be pried into by any but such

[66] The *Moglieff* (1921), 38 T. L. R. 71; Hill, J., at p. 74: "I, however, am of the opinion that the rule that no action lies against the Crown at the suit of the subject is part only of the wider principle that the King cannot, against his will, be made to submit to the jurisdiction of the King's courts."

[67] The fact that the King's exemption was purely personal cannot be too strongly emphasized. Even now it would seem his personal position as incumbent is recognized as the source of immunity. It is not that acts done by the king or in his name are different from other acts; it is merely that, *while king*, he is legally irresponsible. Hence if deposed, there is no reason why he should not be answerable (Munden v. Duke of Brunswick, 10 Q. B. 656). The position was, and still seems to be, that the king merely was exempted from the ordinary jurisdiction of the courts. His position is somewhat analogous to that of a debtor whose debt has been barred by limitations; the act is recognized at its true worth, but does not carry the usual consequences, if he pleads his immunity.

as were initiated in its service; because perhaps the exertion of the one, like the solmnities of the other, would not bear the inspection of a rational and sober inquiry.[68]

Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand; yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his political character, not only large powers and emoluments, ... but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government.[69]

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[68] 1 Blackstone's Commentaries, 237-238.
[69] Ibid, 241.

CHAPTER II

Proceedings against the State in England: The Petition of Right

Monstrans de droit.—Even at common law, though no writ would lie against the king, and the subject's remedy was by petition alone,[1] the subject was allowed in certain instances, where the king was plaintiff, to set up his defence as a bar to an action by the king. This right given by the common law was known as the monstrans de droit; it was purely a defensive measure available at first in suits for the possession of land—the most important subject of litigation in those days. Where the right upon which the Crown claimed was of record, and the right of the subject claiming the same property appeared by the same record or one of as high a character, the subject was entitled to his monstrans.

Thus if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed, which must be upon record, he who has made the conveyance, levied the fine, given the recognizance, &c may have a monstrans de droit by the common law; for the recognizance appears by a record as high as the conveyance. So he may though the performance of the condition be not upon record, if it be afterwards found by office.[2]

Or, if a crown tenant is disseised, and the disseissor dies seised and without heirs, and upon inquest of office the disseisin is reported as well as the fact of the disseissor dying without heirs, the claim and right of the disseissee appear upon the same record as the claim of the king (which is the intestacy of the disseissor) and monstrans will lie.[3]

It is to be noted that monstrans would lie only when the king was out of possession and the right of the petitioner could be shown from, and was not inconsistent with, the record.[4] It would recite the finding of the inquisition or

[1] Bracton, f. 171 b.
[2] Bacon's Abridgment, v, Prerogative E, 7, p. 573.
[3] 3 Bl. Com. 256.
[4] Chitty, Prerogatives of the Crown, 352-356.

the record relied upon, the right of the petitioner as found therein, with an offer to verify the same. The monstrans concluded with a prayer for amoveas manus, restitution of the land, and an accounting for the profits from the date of the making of the inquisition, or return of the record.[5] Upon the filing of the petition, the Attorney-General representing the Crown might confess the title of the petitioner or reply to it, to which the petitioner might demur; the Attorney-General might even after pleading confess title in the petitioner, or a trial on the merits might be necessary. In any case, on finding in favor of the petitioner, the judgment would be "quod manus dominii amoveantur" restoring the party to possession and awarding the mesne profits.[6] If for the king, the judgment was nil capiat.[7] Where the verdict was for the petitioner, possession vested at once in him, without execution.[8]

This was surely no more than the most obvious justice; that where an investigation or proceeding was necessary before the king was legally entitled to possession, and the evidence collected by the king's own officers showed a better right in some one else, the petitioner was allowed to point out this defect in the king's title, apparent upon its face, and, if denied by the Attorney-General, to have the fact tried. Monstrans was available, whether the action was at law or in equity.[9] The petitioner was regarded as in the nature of an intervenor or defendant, who came in to plead to a proceeding that otherwise would vest title in the king.[10]

By Acts of 36 Edward III, c. 13, and 2 & 3 Edward VI, c. 8, the scope of the monstrans was enlarged, so that almost all cases of office found could be traversed, or answered by way of confession and avoidance (traverser l'office, ou autre-

[5] Bac. Abr. v, Prerogative E, 7, p. 573.
[6] Ibid, p. 574.
[7] Holdsworth, History of Remedies against the Crown, 38 Law Quarterly Review, 141.
[8] Chitty, op. cit.; 3 Bl. Com. 257.
[9] 3 Bl. Com. 256.
[10] Bankers, Case, 14 How. St. Trials, 1, 79. But see Bac. Abr. op. cit. p. 574.

ment monstrer son droit); the petitioner could deny the title found in the king or show his own superior right, and thus avoid the title of the king.[11] Under these statutes traverse or monstrans was allowable in regard to all offices found before commissioners or escheators, and applied also to findings of attainder of treason, felony or praemunire.[12] Evidence outside the record was thus made admissible for the petitioner.

An example of the effect of these statutes is seen in the Sadlers' Case.[13] A certain T. Cox had died intestate and without heirs, seised of land that by inquest was found to have been held in socage from the queen, to whom it would therefore escheat. The Sadlers' Company interposed a monstrans, stating that they, the Sadlers' Company, had held the land by devise from a certain R. Myland, until disseised by T. Cox. Before the statutes, since the queen's title appeared of record by inquest, the subject's would need to be of at least as high a character,[14] but this was not necessary since the statutes, so the monstrans was good.[15]

Petition of Right.—Peticion is all the remedy the subject hath when the King seiseth his lands or taketh away his goodes from him, having no title by order of his lawes so to do in which case the subject for his remedy is driven to sue unto his souveraine lord by way of peticion only; for other remedy hath he not. . . . And therefore is his peticion called a peticion of right, because of the right the subject hath against the king by the order of his lawes, to the thing he sueth for. And this peticion may be sued as well in the parlement as out of the parlement, and if it be sued in the parlement, then it may be enacted and passe as an act of parlement.[16]

Ordinarily, it will be seen, the petition of right was used for the recovery of real property; but real actions in medieval times covered many remedies that at present would give rise

[11] Bankers' Case, 14 How. St. Trials, 1, 77-78.

[12] Bacon, op. cit. p. 576. In Tobin v. Reg., (1864) 33 L. J. C. P. 199, 21 E. R. C. 184, 210, there is an indication that these statutes substituted traverse for petition.

[13] 4 Coke 54.

[14] 4 Coke 56 a.

[15] 4 Coke 56 b.

[16] Staundeforde, Prerogative, f. 72 b.

to actions ex contractu and ex delicto.[17] Just when the petition of right, which was a common law remedy,[18] was initiated, is a matter of doubt; it was however regularized as to issuance and endorsement by Edward I,[19] and was probably introduced into England by him after his return from Europe, based on analogues he had observed in Europe, especially in Rome.[20] Its particular function was to afford a remedy by restoration of lands, goods or chattels, in a case where, but for the fact that the king was a party, the suit would have been of a nature cognizable before one of the ordinary courts.[21]

At first it seems that all petitions, appeals to the king's grace, were presented to the king in person,[22] though it is likely that the king consulted his council before taking action.[23] As early as the eighth year of the reign of Edward I[24] an administrative regulation was established requiring that cases properly cognizable in Chancery by virtue of their subject matter should be brought there before application could be made to the king. A similar rule was applied where the relief sought related to acts of governmental departments, an application for redress to the proper department being required. Only if the officials, court or departmental, from whom the relief was sought, thought it necessary, was the matter referred to the king; if it was not deemed of such a character, it was disposed of without being referred to him. Then in 1305 the king addressed a writ to his Chancellor, commanding him to issue a proclamation to the effect that the King in Parliament would receive petitions; the Chancellor was further authorized to designate a committee to receive these petitions. When received, the committee was

[17] Holdsworth, loc. cit. 141.
[18] 3 Bl. Com. 256.
[19] Ehrlich, Proceedings against the Crown, Oxford Studies in Social and Legal History, vi, 74.
[20] Ibid, 96.
[21] Holdsworth, loc. cit. 147.
[22] Ibid.
[23] Ehrlich, op. cit., 95.
[24] The remainder of this paragraph is based on Ehrlich, op. cit. 96-103.

to sort the petitions; those cognizable in the ordinary courts and which in consequence need and should not have been presented as petitions, were to be referred to the proper courts; those capable of remedy by permission, and of ordinary, insignificant character (for example, a claim based on the misbehavior of a bailiff), would be referred to the department heads for settlement; only those that directly affected the king, because his interests were involved or the relief asked was strictly a matter of grace, were reserved for the king and his council. When the petitions reached the council they might be refused, or a procedendo awarded, or a hypothetical decision given, leaving the determination of facts to other bodies or tribunals.

The petitions that were sent to the king because they affected his interest are the real petitions of right; so called from the fact that, but for the immunity of the king, they would have been cognizable at law or equity.[25] When a petition of right was presented to the king and granted, he would endorse it, and further proceedings had to be in strict conformity with the endorsement. If the endorsement was general—"soit droit fait al Partie"—which was usually the one inscribed when the petition closed with a general prayer for relief—"que le roy lui face droit"—the petition would be delivered over, with this endorsement, to the chancellor. He would cause a commission to issue to determine the truth of the allegations; this return then became a matter of record, and the party was admitted to interplead with the king[26]; after which the suit proceeded as between private parties.[27]

The petitioner might have begun a suit in a common law court, and during the trial it would be found that the king's interest was involved; for example, that it was necessary to vouch him to warranty. Proceedings would be stayed until the plaintiff could petition the king, in which event the petition would probably conclude specially. As the case was

[25] Feather v. Reg., (1865) 6 B. & S. 257.
[26] Bacon, op. cit. p. 572.
[27] 3 Bl. Com. 256.

already before a court, all the petitioner would desire would be permission to continue to adjudication, after waiver of the king's immunity had been secured. His petition would then conclude "that it may please his highness to command his justices to proceed to the examination," and upon such endorsement the court would regain jurisdiction.[28]

This remained the law until 1860, but has probably been changed by the Petition of Right Act.[29] As late as 1837 it was applied with full vigor. One Pering addressed a petition of right to the king in "his Majesty's Court of Exchequer at Westminster" praying for compensation for expenses incurred in connection with service rendered the admiralty. The petition was endorsed generally, "Let right be done." Pering then sought to proceed in the court of Exchequer, claiming this was an authorization. The court, however, held that a general endorsement carried the case into Chancery; to allow a continuance or prosecution in the Exchequer, the petition would need to be endorsed "Let right be done in the Court of Exchequer." [30]

Suit by petition was proper for the recovery of land, whether the king had taken possession rightfully or wrongfully.[31] It was also undisputed that it would lie for recovery of a chattel interest in land, and for chattels personal;[32] in at least one case it was used to recover a judgment on a debt which had been pardoned [33]; and it was a proper remedy to recover an annuity granted by the king.[34]

Two early cases seem to extend the petition of right to claims that resemble very closely ex delicto actions in damages. Robert de Clifton [35] was the owner of certain property

[28] Bac., op. cit., 572; Staundeforde, Prerogative, 73 a.
[29] 1860. 23 & 24 Victoria, c. 34, ss. 1, 3.
[30] In re Pering, 2 M. & W. (Exch.) 873. (1837).
[31] Y. B. 17 Edward III, 10; 24 Edward III, 55.
[32] Holdsworth, loc. cit. 154.
[33] Y. B. 34 Hen. VI. pl. 18.
[34] Bankers' Case, 14 How. St. Trials 1, 34.
[35] Robert de Clifton's Case, Rot. Par. 18 Edward III, No. 3. The case is reported practically in extenso in Tobin v. Reg., 33 L. J. C. P. 209, 210, from which case the abstracts of this and the following case are made.

through which weirs had been made and water-courses cut, and turf taken from time to time to repair the weirs. There was no denial of the right to maintain these weirs and water courses, but claim by petition was made for damages suffered by Robert's land in the exercise of this right. By a commission issued under a previous petition, the damages suffered had been ascertained, and this petition sought to have the bailiwick of the house of Poverhill granted as recompense. This would seem to be a case of damage for trespass —certainly a tort action.[36]

In the case of Gervais de Clifton,[37] the petitioner complained of damage to his land from overflow caused by trenches cut by the king's wardens. The petition was endorsed to the chancellor, who issued a commission which found the facts as stated. A second petition was presented, 'priant restitution de ses damages et que ceo soit redresse.' This was again endorsed to the chancellor, with instructions to send it, and the verdict of the inquest, to the King's Bench, where were to appear also the wardens 'qui ou sont et les serjeants du Roi et qu' ils faisaient droit.' Apparently this was a recognition of a petition as the proper method for recovering damages. The chancellor sent the substance of the verdict, instead of the verdict itself, and though leave was given to correct, the report of the case ends there.

In 1860 was passed the Petitions of Right Act,[38] the purpose of which was to make purely procedural changes by

[36] The Court in Tobin v. Reg. attempts to explain away these cases by saying that "the petition is for relief from the exaction of servitudes in excess beyond the right of the dominant tenant, which is in effect a petition that the King would remove his hand from the property of the serviant tenant to the extent of the excess. . . . There may have been a local custom relating to Trent water within the liberties of Nottingham or the honour of Peverill"—to which the obvious answer is, that there may not have been any such custom; on its face the action is one in tort. Holdsworth, loc. cit. 152, explains this and the following case on the fact that what would now be contract or tort actions were then pursued as real actions, and these would be assimilated to actions for nuisance to real property—or quod permittet.

[37] Y. B. 22 Edward III, fol. 50, pl. 12. See two preceding notes.

[38] 23 & 24 Victoria, c. 34.

simplifying the methods to be pursued, and assimilating the proceedings, as far as possible, to the practice and procedure in force when the action or suit was between subjects.[39] Under this Act a petition of right may "be entitled in any one of the Superior Courts of Common Law or Equity at Westminster in which the subject matter of such petition or a material part of thereof would have been cognizable if the same had been a matter in dispute between subject and subject." The petition contains the name of the suppliant and his attorney, is signed by them, and sets forth the facts entitling the suppliant to relief.[40] The ground for relief must obviously be a legal or equitable one, not merely a matter of abstract justice or pure grace.

Practice and procedure, in the discretion of the court to which the petition is presented, conform to that employed between subject and subject, but it is no purpose of the Act to extend the scope of the petition of right beyond what it had formerly been, for "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act"[41]; in fact, the old form of procedure may still be followed.[42]

The petition, after being filed in court, is left with the Secretary of State for the Home Department, for Her Majesty's fiat "that right be done"; no fees are charged for this deposit with the secretary, nor on the return of the petition.[43] If Her Majesty's fiat is obtained, a copy is sent to the Solicitor of the Treasury, who must plead or answer in twenty-eight days.[44] The petition is transmitted by the solicitor to the department whose interests are concerned, and the matter is then prosecuted in the court where the petition was filed, unless the Lord Chancellor shall designate another.[45]

If real or personal property has been granted away by the Crown and becomes the subject of petition, the grantee is

[39] Ibid, Preamble.
[40] Ibid, s. 1.
[41] Ibid, s. 7.
[42] Ibid, s. 18.
[43] Ibid, s. 2.
[44] Ibid, s. 4.
[45] Ibid, s. 3.

entitled to service of a copy of the petition, and may within sixteen days thereafter appear and defend.[46] The petition is to have the same effect as a Bill in Equity, or a declaration at common law[47]; no commission is required to ascertain the truth of the petition, just as none issues to test the declaration of a plaintiff. The defendant answers, pleads, or demurs as in a private case.

That delay may be avoided, and the petitioner may have a trial of his petition on the merits, it is provided that if the Crown fails to plead to the petition or to any subsequent stage of the proceedings, the judge may in his discretion take the petition as confessed and enter a judgment by default, which however may be vacated by him on compliance with such terms as he sees fit.[48] In any such judgment in favor of the suppliant, by demurrer, or on default, the judge may decide if the petitioner is entitled to his claim in full or only in part, and if so to what part; or what further relief is necessary[49]; and though the old judgment of amoveas manus is abolished, the relief granted has the same effect.[50]

The petitioner is entitled to costs against the Crown or an intervenor[51] under the same terms as in suits between subject and subject; if costs are found against the intervenor, a writ of execution may immediately issue.[52] The Crown or the intervenor may under similar provisions recover costs, enforcible by execution.[53] After a final determination that the petitioner is entitled to relief, or to costs against the Crown any of the judges of the court in which the petition was prosecuted may certify the tenor of such judgment or decree to the Commissioners of the Treasury[54] for payment out of any money than legally applicable, or afterwards made available.[55]

The Act in effect provides a means of suing the Crown on any legal or equitable claim which, before the passage of

[46] Ibid, s. 5.
[47] Ibid, s. 6.
[48] Ibid, s. 8.
[49] Ibid, s. 9.
[50] Ibid, s. 10.
[51] Ibid, s. 5.
[52] Ibid, s. 12.
[53] Ibid, s. 11.
[54] Ibid, s. 13.
[55] Ibid, s. 14.

the Act, could have been the basis for a formal petition—if the Crown consents; for the granting of the petition does not follow as a matter of course, though it is customary to grant it in a proper case.[56] If freely granted the procedure is practically the same as an ordinary suit, except that the initial pleading is known as a petition instead of a bill or declaration.

That the granting of the fiat is still subject to the royal prerogative is shown by a case arising soon after the passage of the Act. One Irwin brought an action for damages against the Secretary of State for the Home Department for not submitting to Her Majesty a petition of right brought under the Act. The evidence showed that Grey, the secretary, had presented the petition, with the advice that the petition be refused, which was done. Irwin claimed that this was really no submission; but the court held that a mere submission by the secretary was all it could require; that the petition could be refused, but the court could not inquire into the reason why, but merely if it had been submitted.[57]

In 1864 an attempt was made by means of the petition of right to recover for the tortious act of an officer in the navy. The case, Tobin vs. Regina,[58] a leading one on the subject, definitely establishes the proposition that a petition will not lie for a tort. A vessel belonging to the suppliant and engaged in the coasting trade, had been seized and destroyed by Captain Sholto Douglas, employed under authority of Her Majesty for the suppression of the slave trade, on the ground that she was a slaver. The basis of the petition was the allegation that the vessel destroyed was not engaged in

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[56] The United State Supreme Court, in U. S. v. O'Keefe, 78 U. S. 172, 20 L. Ed. 131, considered that the practice of granting the petition in a proper case, that is, one based on a legal or equitable claim, was so customary as to amount to a standing permission to sue the Government, and was accorded to aliens as freely as British subjects, so that it constituted a compliance with the requirement in the Court of Claims Act that, for jurisdiction in a suit by an alien, his country must allow citizens of the United States to prosecute claims against it in its courts (J. C. 155, Comp St. 1146).

[57] Irwin v. Grey, 3 Fost. & F., 635 (C. P. 1863).

[58] 33 L. J. C. P. 199, 16 C. B. N. S. 310, 10 L. T. 762.

the slave trade; consequently there was no justification for the seizure and destruction, and that such unjustified destruction gave rise to a claim for damages. To this a demurrer was filed, and a joinder on the demurrer. The court said that the Act of 1860 changed procedure only, and not the substantive law [59]; that this was a case of damages for trespass, and under the maxim that 'the king can do no wrong,' even if it could be assumed that Her Majesty had commanded the destruction, since the command was unlawful, it was no command, and the servant alone was responsible.[60] Nor could the doctrine of agency be invoked, for the officer was authorized (his authority extended) only to the destruction of vessels actually employed in the slave trade; if the vessel in fact was innocent "the act complained of was not done by order of the queen, but by reason of a mistake in regard to the path of duty." [61]

This was rather a broad, and it is submitted, an unfortunate application of the doctrine of 'ultra vires.' In the decision the older cases were examined and explained away; but they really would be of little value for they arose in a time when nearly all actions were real actions. There seems little reason why the petition of right should not have kept pace with private law, so that when the relation of principal and agent was thoroughly recognized in similar cases between individuals, it should have been as between subject and crown. It should never be forgotten

> that such a petition was a petition of right—that is to say a petition on which a subject was entitled to succeed if he could show a good legal claim. But obviously the circumstances under which a subject can show a good legal claim change with changes in the law, so that, if this idea is adhered to, it will give an elasticity to the competence of a petition of right which will make it a useful remedy at all periods in the history of the law.[62]

The whole subject was again discussed the following year.

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[59] 33 L. J. C. P. 205.
[60] Ibid.
[61] Ibid, 204, 206.
[62] Holdsworth, History of Remedies against Crown, 38 L. Q. R. 141, 156.

The case arose on a petition of right for the unauthorized use of a patent by the Crown. Though decided on a peculiarity of the patent law, the scope of the petition of right was rediscussed, especially in relation to torts. The purpose apparently was to have a reconsideration of the Tobin case, hoping that it would be overruled, but instead, it was reaffirmed. The language of the opinion summarizes so exactly the present status of torts by government officials, and the impossibility of making them the subject of a petition, and reveals so admirably the influence of formalistic logic on the jural mind that an exact quotation is here given:

> Not only is there no precedent for a petition of right entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs, and not only to wrongs done personally by the Sovereign if such a thing can be supposed to be possible, but to injuries done to a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong, it follows, as a necessary consequence, that the King cannot authorise a wrong. For to authorise a wrong to be done is to do a wrong, inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground.[63]

A petition of right will not lie against a fund under a treaty. Under a treaty with China, a large sum had been

[63] Feather v. Reg., (1865), 6 B. & S. 257, 35 L. J. Q. B. 200, 208.

paid to the queen on account of debts due from Chinese merchants to British subjects. After receipt of the money, Rustomjee, one of the said British merchants, claimed by petition of right his share, representing the amount due from one of the Chinese merchants to him. A demurrer was interposed and sustained, for nothing in the treaty made the Crown a trustee or agent in respect to a specific sum for the benefit of the suppliant or any other subject. In treaty matters the Crown acts in a sovereign capacity, not as the agent of its subjects, and may compromise and dispose of their claims in any manner without necessity for an accounting.[64]

The same matter had been discussed in the case of Baron de Bode vs. The Queen,[65] but there the decision denying the petition was based on the fact that the fund received had been the subject of Parliamentary enactment, whereby a particular method of asserting claims against the fund had been provided. It was held that a petition of right would lie only in the absence of statutory provisions covering the subject-matter of the claim. Accordingly, in a recent case it was held that where a provision had been made by statute for a declaratory judgment against the action of the Attorney-General, that was the proper method to use, and not a petition of right.[66]

There can be no petition of right growing out of state succession, or annexation.[67] Gold belonging to the suppliant, a British company, had been seized by officials of the South African Republic. A receipt had been given, which under the laws of the Republic created legal liability for its value. A few days later war was declared with England, resulting in the annexation of the Republic a year later. The petition was then filed, claiming that by annexation this liability devolved upon the British Government. A demurrer was sus-

[64] Rustomjee v. Reg. (1876) 2 Q. B. D. 69, 46 L. J. Q. B. 238.
[65] 13 Ad. & El. N. S. (Exch.) 363 (1848).
[66] Dyson v. Attorney-General, L. R. 3 K. B. 401, (1911) C. A.
[67] West Rand Central Gold Mining Co., Ltd. v. The King, (1905) 2 K. B. 391, 5 B. R. C. 885.

tained, the court explaining [68] that a contractual element must appear before a petition can be supported; that, anyway, "matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts." [69]

Not only is the petition unavailable for the unauthorized, illegal destruction of property,[70] but also it cannot be used as a means of redress for the negligence of Crown servants. The Viscount of Canterbury had filed a petition for damage done to his property, while Speaker of the House, during the fire that destroyed the Parliamentary buildings, which fire was caused by the negligence of the Crown's servants. The petition had been endorsed "Let right be done" and had been referred to the Chancellor, where a demurrer had been interposed.[71] Since the sovereign is not liable for personal negligence, it would be of no avail to impute to him the negligence of his servants. The demurrer was sustained.[72]

The petition will lie, however, with a few qualifications, for the contract price or for unliquidated damages for breach of a contract. In the leading case on this point,[73] the suppliant had devised and invented certain heavy artillery, and the Secretary of War had agreed that if the plans were approved, an award would be given; if the final tests were successful, all the inventor's expenses would be reimbursed. The petition alleged the compliance with all the conditions precedent, but claimed that the award and compensation had never been paid. To this the Government demurred. Lord Justice Blackburn, delivering the opinion of the court, said [74]

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[68] 2 K. B. 400.

[69] Ibid, 409.

[70] Tobin v. Reg., ante.

[71] The petition, as before noted, merely gives a right to sue, and does not assure recovery, any more than the ordinary civil action.

[72] Viscount Canterbury v. The Attorney-General (1842) 1 Phill. (Ch.) 306, 321.

[73] Thomas v. Reg., (1874) L. R. 10 Q. B. 31, 31 L. T. 439, 21 E. R. C. 202.

[74] 21 E. R. C. 204.

that the general opinion had been that the chief purpose of the Act of 1860 was to simplify procedure, to allow ready access to the courts in just such classes of cases as these. He recognized that the Act gave no new or broader jurisdiction, but found nothing inconsistent with the relief asked in any of the decided cases, and, relying on the Bankers' Case [75] he decided that a petition of right would lie for the contract price on the breach of a simple contract.

So recoveries under a petition of right have been allowed for the contract price on a contract with the War Department [76]; to recover tolls due under an agreement [77]; succession duties [78] excise and customs exactions [79]; on a charter party with the Admiralty [80]; and in Canada on a quantum meruit basis for professional legal services rendered the Government.[81]

The next step extended the petition to a claim for unliquidated damages for breach of a contract with the Government. In the case of Windsor and Annapolis Rwy. Co. vs. Regina & Western Counties Rwy.,[82] the Government of Canada by an agreement in 1871 undertook to give to the ap-

[75] 14 How. St. Tr. 1. As a matter of fact, this case was a direct action against the chamberlain and treasurer of the Exchequer to compel payment of an annuity, charged on the hereditary revenues of the excise, in compensation for a 'loan' made by the Bankers to Charles II. The chief point of difference among the justices was whether a petition of right was the only remedy available, for all agreed that was proper, and some said exclusive. The direct action was finally upheld in the House of Lords.

[76] Kirk v. Rex (1872) L. R. 14 Eq. 558. Here the court said: "The result of a petition of right, if successful, was that Her Majesty—not with reference to the remedy, but the trial of the right, so to speak—descended from the throne and allowed herself to sued before her own inferior officers, just as if she were a subject; and proceedings were instituted in the same form, and with the addition of whatever other parties might be necessary, or would be proper if the Queen had been a subject."

[77] Tomline v. R. (1879) 4 Ex. D. 252.

[78] In re Nathan (1884) 12 Q. B. D. 461.

[79] Malkin v. Rex (1906) 2 K. B. 886.

[80] Yeoman v. Rex (1904) 2 K. B. 429.

[81] Rex v. Doutre (1884) 9 A. C. 745, 53 L. J. P. C. 84. For a detailed account of cases, with forms of procedure, see George S. Robertson, Civil Proceedings By and Against the Crown.

[82] 11 App. Cas. 605, 55 L. J. P. C. 41, 21 E. R. C. 214 (1886).

pellant the exclusive use of the Windsor Branch Railway for twenty-one years, beginning in 1872. The appellant took over and ran the Branch until August 21, 1877, when the Government Superintendent of railroads took possession of the line, held it until September 24, 1877, and then transferred it to the Western Counties Railway. A bill in Equity was filed against the latter company, and a decision rendered restoring the road to the appellant. The appellant, before decision in the Equity case, filed a petition of right in the Court of Exchequer in Canada, asking specific performance of the Government contract and damages resulting from the breach. It was dismissed, but on appeal to the Supreme Court of Canada, damages were allowed for the period the Branch actually was in Government possession (August 1, 1877-September 24, 1877). An appeal was taken to the Privy Council, asking for damages for the whole time the Branch was out of the possession of the appellant.

The Council, speaking through Lord Watson, said [83];

> Their Lordships are of opinion that it must now be regarded as settled law that, wherever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown by carrying the reasoning of Thomas v. Regina to its logical conclusion. In reply to the argument that no breach of the agreement had been committed by the Crown, for the dispossession of the appellant was the tortious act of the Government supervisor alone, the court found that his action was "with the full authority of the government, and merely carried out their instructions, which were issued in the belief that it was within their legal right to put an end to their agreement with the appellant company." [84]

Judgment was given for the appellant for the full term that it had been deprived of the benefit of the contract.

The Crown is incapable of committing or authorizing a tort, but it can break a contract, and be made to pay; yet the latter would seem no less inconsistent with "absolute perfection" [85] of the sovereign; it would seem just as "indecent" [86] to suppose the breach of a contract to be the act of the sovereign, as the commission of a tort. This "distinc-

[83] 11 App. Cas. 613.
[84] Ibid, 615.
[85] 3 Bl. Com. 246.
[86] Ibid, 244.

tion" between contract and tort is further illuminated by two cases arising during the World War. Premises had been taken for an aerodrome, and a petition of right was sued, for compensation for the expropriation. It was refused, the court holding that in time of war, by virtue of the royal prerogative and the Act of 1914, land could be taken in defense of the realm without compensation.[87]

This decision was expressly overruled in a later case.[88] There a hotel had been taken under exactly similar circumstances, over the protest of the owner. He brought a petition of right for rent, or compensation. Rent was denied, for to recover rent there must be an agreement to pay, but under the theory of the suppliant the taking was unlawful, so there could be no agreement; the tortious act was not that of the Crown, which can do no wrong, but of the officer of the Crown.[89] But the court considered that the taking was authorized, and that under such conditions there had been an "universal practice of payment resting on bargain before 1708 and on statutory power and provision after 1708." [90]

To the general proposition that a petition of right will lie for actions ex contractu there are at least two exceptions. First, it will not lie for soldiers' pay.[91] The suppliant had enlisted for the duration of the war at six shillings per diem; after two years the claim was made that he was a "time serving soldier" enlisted for seven years at one shilling per diem. His pay from then on was according to the latter basis, and deductions were made for the alleged excess. Suit

[87] Re a Petition of Right, (1915) 3 K. B. 649.

[88] Attorney-General v. De Keyser's Hotel (1920) A. C. 508.

[89] Ibid, 522. One might ask how the Crown could break a contract; it is merely the act of its officers. The correct answer would seem to be that the Crown can commit a tort, as well as break a contract, but that a remedy has been given only for actions ex contractu. The law does not authorize a tort—there has been no tort; the law does not authorize breach of contracts, but it does recognize them, so a breach occurs. The theory the king can do no wrong would be equally applicable or inapplicable to both—the practice is different.

[90] Ibid, 525.

[91] Leaman v. The King, 36 T. L. R. 835 (K. B.).

for reimbursement at the rate of five shillings per day was entered. The court admitteed that under the manual of Military Law this enlistment was a contract, but it held it was a contract of a kind that did not carry the rights of ordinary contracts as to modes of enforcement, and denied the petition.[92]

Nor, secondly, may the petition of right be used to recover on a contract that fetters the use of the executive power.[93] The proper authorities had assured the owners of a Swedish ship that if she brought a cargo of a certain nature she would be allowed to leave at will. One trip was so made; on another, under the same stipulation, she was detained. The court held that this was a contract purporting to give an assurance of what the Executive action would be in the future.[94] The government cannot fetter its future executive action, which must be left free to be determined according to the circumstances as they arise. The petition was rejected.

[92] Ibid, 837.
[93] Rederiaktiebolaget Amphitrite v. The King, (1921) 3 K. B. 500.
[94] Ibid, 503.

CHAPTER III

The State as Plaintiff: England

The rights and prerogatives of the Crown are in most cases as old as the law itself.[1] Because of the attribute of sovereignty[2] with its necessary requirement of inability to do wrong,[3] and the sovereign's capacity as "fountain of justice"[4] the King (State, Crown) may not be sued without his consent, and then only in the manner prescribed, which, as we have seen, is, in England, by the Petition of Right.[5] These same attributes require that when the king uses his own courts as plaintiff, he should do so with benefits not accorded to ordinary mortals. These privileges, of historic, common law origin, have in many instances been modified by statute.[6] But statutes do not bind the king unless he is specially named, although he may take the benefit of a statute, whether named or not.[7]

Where the king is the sole plaintiff, he cannot be non-suited[8]; for, as the fountain of justice from which the courts derive their authority, he is deemed always to be present in them,[9] and, as the basis of a non-suit is the failure of the plaintiff to appear, it is obvious that a plaintiff who is always present cannot be non-suited for absence.[10] If, however, the suit was brought for the benefit of the king but by an in-

[1] Bac. Abr. v. 489.
[2] 1 Bl. Com. 242.
[3] Ibid, 244.
[4] Ibid, 266.
[5] Chap. II.
[6] Bac. Abr. v, 489.
[7] Magdalen College Case, (1616) 11 Rep. 68 a, b.
[8] The following are illustrations of the principle enunciated; that the Crown as Plaintiff occupies a favored position, and are intended merely to illustrate the scope of its application. The doctrine is treated in somewhat more detail in connection with the United States, Chap. VIII. The whole subject in English Law is exhaustively treated in a volume intended for use by English practitioners —George S. Robertson, Civil Proceedings by and against the Crown.
[9] Bac. Abr. v, E. 7, 567.
[10] 1 Bl. Com. 270.

dividual as distinguished from an officer of the Crown, as, for example, a qui tam informer, then the failure to appear or prosecute the suit by the private instigator would terminate the suit, both as regards the informer and the king.[11]

To invoke his privilege, it is not necessary that the king appear as a party of record; if in the course of the trial it appears that his interests are or may be affected, the decree will be rendered in such a way that, though settling as far as possible the points at issue between the subjects it will still be "without prejudice to the rights of the Crown."[12] So where the title of the Crown appeared by the record, although no claim was made by the Attorney-General, the court felt bound to dismiss the bill, no petition of right having been prayed.[13]

One of the most important and fundamental of the privileges of the king was that, in the absence of statutes specifically mentioning him, he was not bound by limitations.[14] This was equally true whether the king was plaintiff[15] or whether the privilege came up in a collateral suit; as, for instance, in a dispute concerning the true incumbent of an office, where the present incumbent relied upon the king's power of appointment, which the plaintiff insisted had been lost by non-user. The king's council decided in that case that "there is no lapse of time for the Lord the King."[16]

The explanation for this as for the other prerogatives is probably the simple fact that the king, head of the feudal system, in his own courts where the judges were his appointees and where no suit of any kind could be prosecuted without license (writs of Right) could make his own rules and prescribe his own conditions. It is with the later development of the idea of the supremacy of law, in a system still headed by the king, and in which he was still by legal

[11] Bac. Abr. v, 568.
[12] Penn v. Lord Baltimore, 1 Ves. Sr. 444, 454.
[13] Barclay v. Russel, 3 Ves. Jr. (Ch.) 424, 436.
[14] Magdalen College Case, 11 Rep. 66 b, 68 b.
[15] Y. B. 20 & 21 Edward I, 68.
[16] Bishop of Sabina v. Bedewynde, Select Cases before the King's Council (Selden Soc.) 18, 25.

fiction omnicompetent, that jurists attempted legal explanations to reconcile these apparently inconsistent views. "There never was a tyrant who did not find some jurist to justify him," though the explanation in this case is ex post facto. Bacon explains that limitations do not run against the king for "from the presumption that the king is daily employed in the weighty and publick affairs of government, it hath become an established rule at common law that no laches shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent."[17] Blackstone also 'explains' the principle on the ground that the king is so busied with the public good that "he has not the leisure to assert his rights within the time limited to subjects."[18] Likewise it is true that laches cannot be imputed to the Attorney-General when he is suing on behalf of the public.[19] By statute, limitations in certain cases expressly apply to the Crown as well as to subjects. Suits relating to title to land must be brought by the Crown within sixty years[20] and a thirty year limitation specifically binds the Crown in cases of prescription.[21]

Before a statute passed in the twenty-first year of the reign of James I,[22] the Crown occupied a peculiarly favorable position in ejectment cases. Where the Crown filed an information of intrusion (trespass against, or injury to property) this placed the Crown's title on record, and shifted the burden of proof to the defendant, who, contrary to all the canons of ejectment proceeding, was compelled to plead specially, and prove that the land was not the Crown's; after that statute, if the occupant had been in possession twenty years he could plead generally, throwing the onus on the Crown, and retain possession until the Crown proved its title.

Where the king is plaintiff, he can choose his own court[23];

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[17] Bacon, Abr. Prerog. E. 6. 562.
[18] 1 Bl. Com. 247.
[19] Attorney-General v. Bradford Canal Proprietors, (1866) L. R. 2 Eq. 71.
[20] 9 George III, c. 16, s. 1.
[21] 2 & 3 William IV—Prescription Act.
[22] 21 Jac. I, c. 14.
[23] Y. B. 16 Edward III, 31.

the Crown may amend its pleadings at any time [24] and can plead double, or plead and demur.[25]

If the Crown brought an action against a subject, and the subject had against the Crown what as between individuals would constitute a good claim, or ground of action, he could not have pleaded this by way of set-off; such would in effect have allowed a suit against the Crown. As between subjects such a set-off would be allowed to prevent circuity of action; but obviously no circuity of action can be avoided where the party seeking to set off his claim could never have enforced it in an independent action.[26]

By statute,[27] Crown suits for the recovery of debts are given preference even over suits previously instituted by subjects; for the recovery of such a debt the Crown has first execution against the defendant, provided the Crown's suit was begun before judgment against the same defendant had been given a subject. The effect of the statute seems to be to give the Crown priority as among claims of the same rank regardless of time order, but not, for instance, to make the simple unsecured claim of the Crown superior to a prior judgment, nor to extinguish an existing lien.

C. agreed to sell J. certain property, the payment to be secured by J. depositing the title deeds to other property, that is, by giving an equitable mortgage, in addition to posting a bond for the balance, containing a recital of the deposit of the title deeds. Before time set for payment, J. became a bankrupt, and an extent was issued for arrears in taxes, under which the property represented by the title deeds was seized. J. had also defaulted with certain Government deposits. At the time of the transaction with C., J. was not a debtor of the Crown, and his default had not been discovered; had it been found by inquisition previously, it would

[24] Robertson, op. cit. 213.
[25] Tobin v. Reg., (1864) 33 L. J. C. P. 199, 16 C. B. N. S. 310.
[26] See Rex v. Copeland, 1799, cited Butterworth, Dig. i, 530, 339. It was not until the reign of George II that set-off even as between individuals was allowed (Harrison's Index, iii, 1159).
[27] 33 Henry VIII, c. 39, s. 51.

have been a matter of record, and have afforded constructive notice to C. The question, recognized by the court, was if a simple contract debt due the Crown should take precedence over an equitable mortgage due a bona fide holder for value without notice, or if the Crown took the property impressed with and subject to the equity. Here the land had been taken by the Crown and sold, but it was held that the legal title had not passed, the court saying "if we find that the plaintiffs are equitable mortgagees, of course they are entitled to be paid before the Crown, if their title is, in point of time, anterior to that of the Crown." The judgment was that the title deeds should not be surrendered up unless the sale exceeded the value of the mortgage.[28]

In another instance the king by prerogative process had seized the goods of one Ogle for an immediate debt due the Crown. The goods at the time of the seizure were in the hands of Lee, Ogle's salesfactor, who had cashed drafts drawn on him by Ogle, by virtue of which transaction he claimed a lien. The court held that the Crown was in no better position than Ogle; that as Ogle could not have claimed the goods, even though title was in him, without paying the drafts, neither could the Crown.[29]

The same applies in cases of forfeiture. Pawlett had mortgaged lands to Ludlow to secure a debt; the mortgage had matured, but it had not been foreclosed. Ludlow died, devising his lands to his son, who was later attainted of treason, forfeiting his property to the Crown. In a suit by Pawlett to redeem, the court held that the king, the fountain of justice, should not be presumed to be defective in that commodity himself; that he took the escheat subject to Pawlett's right of redemption.[30] In a case the converse of that one, Lord Chancellor Hardwicke ruled that the court would not decree a foreclosure against the Crown, but would allow the

[28] Casberd v. Attorney-General, 6 Price, (Exch.) 411, 464.
[29] The King v. Lee, 6 Price, (Exch.) 369, 378.
[30] Pawlett v. Attorney-General, Hardres (Exch.) 465, 469.

mortgagee to hold the premises until the Crown thought proper to redeem the estate.[31]

At common law the Crown did not receive or pay costs; it was the king's prerogative not to pay, and beneath his dignity to accept them.[32] Such is still the rule in cases before the House of Lords and the Judicial Committee of the Privy Council.[33] In respect to ordinary actions against subjects or by subjects in revenue cases, the act of 1855 [34] assimilates the recovery and payment of costs to conform to procedure between subject and subject. The Crown if successful is entitled to costs,[35] and if judgment is given against the Crown, the subject is entitled to be paid on the same basis, by the Commissioners of the Treasury from any funds appropriated for that purpose.[36] This has been extended to all proceedings at law or in Equity on the revenue side of the Exchequer.[37] Appeals and writs of error from judgments for the Crown no longer need the consent of the Attorney-General, but are allowed under the ordinary rules of court.[38]

In a Chancery case it was said that in Equity the Crown and subject always were on an equal footing; the particular point that drew forth this general statement was the decision that the subject and the Crown had the same rights as to discovery and costs.[39]

An interesting example of the method in which the courts, although still acknowledging the force of the old doctrines, endeavor to work justice whenever possible, is found in a recent case. Certain ships had been seized on attachment proceedings by British subjects to satisfy a judgment against a Russian corporation. These ships were claimed by the

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[31] Reeve v. Attorney-General, 2 Atk. 223.
[32] 3 Bl. Com. 400.
[33] Robertson, op. cit. 617.
[34] Crown Suits Act, 18 & 19 Victoria, c. 90.
[35] Ibid, s. 1.
[36] Ibid, s. 2.
[37] 22 & 23 Victoria, c. 21, s. 21.
[38] Robertson, op. cit. 214.
[39] Attorney-General v. London Corporation, 2 Mac. & G. (Ch.) 247, 258-259, 271.

Crown, after which motion of interpleader was filed. The plaintiffs said that as the Crown had asserted a claim, it should prove it; that interpleader was not a suit against the Crown. The judge refused to grant the motion, saying that the king could not, against his will, be made to submit to the jurisdiction of his own court; but, as there seemed considerable doubt as to the Crown's title, the court refused to dissolve the attachment until this question was determined.[40]

The Crown, then, although at common law enjoying a favored position, has been restrained, and placed upon a more nearly equal footing with the subject, both by statute, and judicial application of equitable principles.

[40] The *Moglieff*, 1921, 38 T. L. R. 71, 74. Unless the Crown decided to play dog in the manger, it is obvious that the plaintiffs really gained their point.

CHAPTER IV

Suits against Officers: England

We have seen that no petition of right (no action against the Sovereign) will lie for the tortious act of an officer.[1] The king is incapable of doing wrong; but acts done apparently at the command of the king do in fact contravene the established rules of law, and work damage to the subject. How can this be reconciled with the idea of an omniscient, omnipotent monarch? The answer is easy to the legal theorist. The king himself would not have ordered or allowed a wrong to be done; if then in fact his command has led to an injury, it is because he has listened to the siren voice of an evil counsellor, and this counsellor, not clothed in the regal cloak, is amenable to punishment; no one may aid or cause the king to act in contravention of the laws of the land.[2] "Whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he but his ministers, accountable for it to the people."[3] 'The king can do no wrong' means in effect that the king must not be allowed to do wrong; if an act is in fact a wrong, and but for the position of the king would give rise to an action for damages, the difficulty and injustice to the one injured must be avoided by ascribing the injury to one who is amenable to civil jurisdiction; the one who actually did the wrong, rather than the one who gave the order.

Another way of regarding the matter and accomplishing the same result, is to hold that if the order of the king contravenes an established rule of law, the command will in law be considered as no command, or perhaps more accurately, no justification; hence the actor, having no command of the sovereign, or no defense by virtue of it, has acted as an individual, and is left to the jurisdiction of the courts.[4] That is, because the king can do no wrong, his

[1] Chap. ii, pp. 23-28.
[2] 1 Bl. Com. 242.
[3] 3 Bl. Com. 254.
[4] Bac. Abr. v. Prerog. E. 550.

orders, if authorizing an act that in reality is a wrong, are not his orders; the servant cannot rely on the authority of the Crown as a defense, but must be able to justify his acts, if causing damage, according to the principles of private law.[5]

It seems that this was not always the case, and that at first, when the king's courts were really his, and subject to his control, royal authorization was a complete bar to any action.[6] The judges, his appointees, were subservient to the orders of their master, and bound by his determination of what was justiciable. But immunity was a privilege of the king, not of the official who had acted wrongfully; and if the king waived this privilege, the officials were responsible before the courts just as were any other subjects.[7] The authorization of the king did not change the nature of the act; it was still a wrong; but the king did have the power to prevent a prosecution. The present rule, that the king can do no wrong, that is, must not be allowed to do a wrong, and therefore his authorization does not justify a wrongful act, is clearly expressed in a fairly recent case:

> The maxim that 'the King can do no wrong' is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; that which the sovereign does personally the law presumes will not be wrong; that which the sovereign does by command to his servants cannot be a wrong in the sovereign, because if the command be unlawful, it is in law no command, and the servant is responsible for the unlawful act in the same way as if there had been no command. Lord Hale says, "The law presumes the King will do no wrong, neither indeed can do any wrong; and, therefore, if the King command an unlawful act to be done the offence of the instrument is not thereby indemnified. But though the King is not under the coercive power of the law, in many cases his commands are under the direct power of the law, which, consequently, makes the act itself invalid if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." [8]

This applies to the illegal action of even the highest officers; the Governor of Minorca was held liable in damages

[5] Cf. Bonnard, De la Responsabilité Civile des Personnes Publiques et de leurs Agents, p. 32 ff.

[6] Ehrlich, Proceedings against the Crown, p. 28. (Hen. III).

[7] Ibid, 200.

[8] Tobin v. Reg., (1864) 33 L. J. C. P. 199, 205-206, 16 C. B. N. S. 310.

for false imprisonment of the plaintiff in Minorca, in a suit brought against him in England after the expiration of his term.[9]

Inferior ministerial officers are not protected by the orders of their superiors, when such orders are in excess of authority. A famous case in connection with the printing of one of the throne speeches (in the North Briton No. 45) perfectly illustrates this. Purporting to act under the authority of a warrant from the secretary of state, several of the King's Messengers broke and entered the house of one Leach, to arrest him for causing the speech to be published. He brought an action in trespass against them; they pleaded the warrant. Leach was allowed to recover, the court holding that the secretary had no power to issue such a warrant, which was therefore of no protection to those who acted under it even though in the best of good faith. Actual, not apparent authority is necessary for protection.[10]

So a sheriff was held liable in damages for a false return on a writ, whereby the plaintiff was damaged, the court finding against him for the actual damage occasioned, even though there was no evidence offered or suggested to show a malicious motive.[11]

The ordinary rules of private law are applied in such cases. The commander of a warship was held liable for damages on the doctrine of "last clear chance." The evidence showed that the plaintiff had been guilty of contributory negligence, but the defendant by the exercise of ordinary care could have avoided the accident, so, just as in a case between subject and subject, the plaintiff's negligence was no bar.[12]

This whole doctrine was examined in a case before the Privy Council some years ago, in which the owners of tugs used in pilot service in the rivers of India brought suit for damages caused by what was alleged to have been unjust dis-

[9] Mostyn v. Fabrigas, Cowp. 161 (K. B. 1774).
[10] Money v. Leach, (1765) 3 Burr. (K. B.) 1742.
[11] Brasyer v. Maclean, L. R. 6 P. C. 398, 406.
[12] H. M. S. Sans Pareil (1900) L. R. P. D. 267.

crimination against them. The defendant pleaded the orders of his superior officers. The Privy Council found that the order relied upon was in fact within the officer's competence, and as no malice was shown, was a good defense, but reiterated the principle that the command of a superior officer was not in itself sufficient justification for the act of an inferior, unless the superior had authority to issue such command. Even then, abuse of the order by the inferior, as turning it for his own purposes, would render him liable.

> . . . if the act which he did was in itself wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the Supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agents, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration.[13]

Even as between superior and inferior, the rules of principal and agent do not prevail. A servant of the Crown is in general liable only for his own wrong, not that of his subordinate. This of course is no more than just in most cases, for the superior officer usually has had nothing to do with the hiring of his subordinates; their negligence could not with any show of reason be attributed to him. Of course, another practical consideration enters this as it does almost all other rules of public law—if the superior were held for the acts of his inferiors, whom he did not appoint and frequently could not discharge, there would be extreme difficulty in securing anyone to act as head of the great departments and governmental services.

Lord Mansfield voiced this conclusion in an early case. An action had been brought against the Postmaster General for the default of one of his subordinates. In dismissing the

[13] Rogers v. Rajendro (Rofindine) Dutt, 13 Moo. P. C. 209, 236. (1860). If the last clause were altered to read 'right to maintain an action and secure an ordinarily worthless judgment from a financially irresponsible servant' it would be consonant with actuality.

case, the Lord Justice pointed out that the Postmaster was not charged with any personal negligence, but only the 'constructive negligence' of his servants. The Postmaster, just as the heads of the other departments, was liable only for personal delicts.[14]

It is the actual wrongdoer, whoever he may be, not the superior officer who gives the command, who is primarily liable in damages to the aggrieved subject. Where a ship had been destroyed by war vessels after the cessation of hostilities, the proper parties to be sued by the ship owner were the commanding officers of the capturing war vessels, not the admiral of the fleet, though if the captains acted in reliance on his order, he might be liable to them, in a subsequent action, for the judgment recovered against them.[15]

If, however, the act of the inferior can be ascribed to the superior; if it was substantially the act of such superior, he, the superior, may be held liable to the injured party in the same suit, not because of, but in spite of, his position, just as any third person committing, or causing to be committed, the same act would be. A suit for trespass was brought against Goschen, the actual wrongdoer, and his superiors, the Lords of the Admiralty, for trespass to the property of the plaintiff. The suit was dismissed against the Admiralty as a Board, but without prejudicing the rights of the plaintiff to bring suit against any individual Commissioner of the Admiralty who might have directed the trespass.[16]

In making contracts an officer may act in such a manner as to reveal his principal, the public, and relieve himself from personal liability. To this extent the ordinary rules of agency are recognized; the agent who discloses his principal, and contracts in his principal's name, is not liable to third

[14] Whitfield v. Lord Le Despencer, 2 Cowp. 754.

[15] The Mentor, 1 C. Rob. 179. (1799).

[16] Raleigh v. Goschen, L. R. 1 Ch. 73, 77, 67 L. J. Ch. 59. In this case if, as alleged, one of the Commissioners had directed the acts of trespass to be done, the trespass was of such a flagrant character as to constitute a plainly illegal act, which must have been known by the commissioner to have been such; he would then be liable as any other principal deliberately authorizing the same act.

parties with whom he contracts. Accordingly, where contractors knew that supplies furnished by them were for the use of the government, the fact that the Governor of Canada was the one who ordered the supplies did not render him personally liable. There was everything to negative the idea that he was contracting personally.[17]

So the Commissary-General is not liable for contracts entered into by him on behalf of the Commissary Department,[18] nor is the Secretary of War where he contracts on behalf of the Crown for the use of a machine; the contractors' remedy would be by Petition of Right.[19]

The presumption is that a known public agent does not intend to bind himself personally, in the absence of evidence of an express intent to do so; and if he has not unmistakably acted so as to bind himself, he is not liable for a breach of contract, even though it be of such a character that had the agency been of a private nature he would have been obligated. For instance, where a man had been employed by a commissioner for three years but was discharged before that time, he could not sue the commissioner for breach of an implied warranty that he would be allowed to work for three years. The commissioner acted on behalf of the service, whose rules did not guarantee to any employee any definite period of employment.[20] But the acts of public officers will, if reasonably within the scope of their authority, bind the government, whose agents they are; for the government can act only through agents.[21]

Ministerial officers act at their peril, and the courts are always open to the aggrieved subject for redress. Where, however, the officer acts in a "public and official" character; when his duty is discretionary, that is, where his duty is really owed only to the Crown, to exercise to the best of his ability the powers in him vested, then his accountability is to

[17] Macbeath v. Haldimand, (1796) 1 Term Rep. (K.B.) 172.
[18] Palmer v. Hutchinson, 6 App. Cas. 619.
[19] Hosier Brothers v. Earl of Derby, 119 L. T. 35 (C. A.).
[20] Dunn v. Macdonald, L. R. 1 Q. B. 555 (C. A.).
[21] Attorney-General v. Lindegrin, 6 Price (Exch.) 287.

the Crown alone, and he is not subject to private suit. Where the Secretary of War had received money to be applied to the payment of pensions, and had retained part of the sum because of alleged misconduct of the pensioner, he was liable to account to the Crown alone because of "public policy."

An action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability.[22]

So also where the possession of the officer is solely on behalf of the Crown, in whose name and for whose interest he holds, an action of ejectment, though in name against the officer only, and apparently merely between subject and subject, is in reality a suit against the sovereign, and cannot be maintained.[23] The same principle applies in the case of a mandamus.[24] In both instances the effect would have been to remove the Crown from possession under the guise of an ordinary action between subject and subject. As the Crown can act only by means of agents, if these agents could be subjected to control it would in reality be control of the Crown.

Where, however, the duty of the officers is purely ministerial, then the courts in compelling them at the instance of private persons to do the acts legally required of them, act not in derogation but in aid of sovereignty, and mandamus will lie. Where the Commissioners for Special Purposes were required to make repayments from public funds held by them on the determination of a commission that a tax had been overpaid, then such determination imposed a non-discretionary duty on the former, enforcible by mandamus.[25] So where a statute imposes a peremptory duty, mandamus will lie.[26]

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[22] Gidley v. Palmerston, 3 Brod. & Bing. (C. P.) 275, 286.
[23] Attorney-General v. Hallett, 15 Mees. & W., 97.
[24] Queen v. Powell, 1 Q. B. 352.
[25] Rex v. Commissioners for Special Purposes of Income Tax, 1888, 21 Q. B. 313.
[26] Commissioners for Special Purposes of the Income Tax v. Pensell, (1891) A. C. 539. W. W. Lucas, in an article, "The Legal Status

Likewise where the Lords of the Treasury act as a "mere ministerial conduit" for the transmission of funds to the parties entitled, their action may be controlled by the courts. Parliament abolished certain offices, making provision for compensation to the incumbents. A claimant against the fund enjoined the Lords Commissioners from distributing the fund until he had opportunity to demonstrate his claim. A demurrer interposed by the Commissioners alleging the non-suability of the Treasury was overruled, the court declaring the injunction interfered with no public duty or discretion of the commissioners, but sought merely to restrain a ministerial act, until the person really entitled to the fund was determined.[27]

Two limitations on the tendency to hold officers personally liable, remain to be noted.[28] The first of these is comprised under the rubric "Act of State."[29] This doctrine is that a wrong done by an English official in a foreign country to a foreigner, if authorized or later ratified by the Crown, is not justiciable in English courts.[30]

The leading case is Buron vs. Denman.[31] Denman was a naval officer stationed off the coast of Africa, under orders to suppress the slave trade. He concluded a treaty with a tribal king by which the plaintiff's trading post was destroyed, and his slaves freed. By the law of the country where the

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of Sovereignty" reviewing the cases, says, "Is the Crown liable to mandamus? The answer is simple; Yes, when the duty is a ministerial one; No, when it is a discretionary one" (24 Juridical Review 185, 188).

[27] Ellis v. Lord Gray, 6 Simon (Ch.) 214; but see Gidley v. Palmerston, above p. 45.

[28] There has been some attempt to render the government services amenable to ordinary civil actions by removing certain types of activities in connection with the public services from the great Departments, and placing them under a Board or Commission, which may sue and be sued (See Robertson, Book I, for a list of Departments, Boards and Commissions, and their stati. See also Morris v. Carnarvon County Council, (1910) 1 K. B. 154 where such liability was enforced, and Saunders v. Holborn District, L. R. 1 Q. B. 64 where it was denied).

[29] See W. Harrison Moore, Act of State in English Law.

[30] See Dicey, Law of the Constitution, 7th ed. p. 363, n. 2.

[31] 1848 2 Exch. 167, Scott, Cas. Int. Law (1922) p. 394.

plaintiff was living, and where the acts complained of were done, slavery was legal. Denman's act was plainly and admittedly in excess of his authority, and constituted an aggravated tort. His action was communicated to his superiors, the Lords of the Admiralty and the Secretaries of State for the Foreign and Colonial Departments, who adopted and ratified the act. In an action against Denman in England, this ratification was pleaded and accepted as a bar to the action.

The exact limits of the doctrine are pointed out in a later case, where it was explained that

> acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of state. . . . But as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned.[32]

A recent case, occurring during the World War, and under the most trying circumstances, served still further to narrow the scope of this plea. In Johnstone vs. Pedlar [33] it was held that an alien resident in Ireland was entitled to the protection afforded English subjects; against him the "Act of State" could not be pleaded.

A second limitation on the liability of officers for their acts according to the ordinary rules of private law is embodied in the Public Authorities Protection Act, 1893.[34] The true purpose of this Act seems to be to protect officers, when engaged in public duty, from all except compensatory damages; and to require prompt action on the part of the aggrieved. The provisions of the Act apply whenever "any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any al-

[32] The Secretary of State for India v. Kamachee Baije Sahiba, 13 Moo. P. C. 22 (1859), Scott, Cas. Int. Law p. 397.
[33] H. L. 1921, L. R. (1921) 2 App. Cas. 262.
[34] 56 & 57 Victoria, c. 61.

leged neglect or default in the execution of any such act, duty or authority." [35]

Any action against a public authority must be commenced within six months after the occurrence or cessation of the act complained of [36]; if the verdict is for the defendant, he is given costs, including solicitor's fees.[37] If the action is one for damages, "tender of amends before the action was commenced, may in lieu of or in addition to any other plea, be pleaded." If an action is commenced or continued after tender, and the plaintiff does not recover more than the amount tendered, he does not receive costs but pays them.[38] Finally, if in the opinion of the court the plaintiff has not given the defendant opportunity to make a tender of amends, the court may award the defendant his full costs.[39]

Under judicial interpretation of the Act,[40] a private individual engaged in public service is entitled to its benefit [41]; so is a public body engaged in trade, if not for a profit [42]; the act done must be in the public interest [43]; and must have been done directly in pursuance of such duty.[44]

This constitutes an extremely close approximation to the introduction, on a limited scale, of a system of administrative law into a country whose lawyers at least have boasted that the same rules of law were applied, regardless of the parties.[45]

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[35] Ibid, Preamble, sec. 1.
[36] Ibid, sec. 1 (a).
[37] Ibid, sec. 1 (b).
[38] Ibid, sec. 1 (c).
[39] Ibid, sec. 1 (d).
[40] C. S. Emden, Public Authorities Protection Act, 1893, 39 Law Quarterly Review, 341.
[41] Turley v. Daw, (1906) 94 L. T. 216—bailiff who made false return.
[42] Attorney-General v. Margate Pier Co., 1900, 1 Ch. 749.
[43] Ibid.
[44] Edwards v. Metropolitan Water Board, (1922) 1 K. B. 291. At p. 305 the court held that it was "not essential that an act done should be done in discharge of a duty. . . . It is enough if it is done in the exercise of a power or of an authority provided it is to be exercised for the public benefit."
[45] Dicey, Law of the Constitution, 8th ed. 384 n. Further discussion of the Rule of Law, and Administrative Law is reserved for Chapter X.

Certainly the action between subject and subject is beset with no such limitation and danger as to costs. It would seem, however, to be a fair protection to an officer who has acted in good faith, but mistakenly; it at least relieves him from punitive damages, and suits not based on probable cause.

The result is that a British subject has a right of action (we will not say remedy) in British courts against an officer who acts illegally, whether from malice or from a mistake of law; the officer may not plead the wrongful order of his superior, but may show that his position is one of trust and discretion, in which case he is responsible to the Crown alone; or, in the case of contracts, that the contract on which he is sued was made in the public name. Subject to recent modifications, the subject has the same right of action against an officer not in the above exempted classes, that he would have against another subject for the same act. The king alone, or the chief executive officers in whom is vested discretionary power, can do no (actionable) wrong.

CHAPTER V

The Doctrine of Non-Suability in the United States [1]

It seems a peculiar thing that the United States, the first of the "Modern Democracies," should from its very inception have adopted the theory and practice of state and governmental immunity from suit. It is all the more remarkable from the fact that there was no central figure, no king to whom the attribute of irresponsibility because of infallibility could be attributed, thus affording at least a concrete juristic reason or argument for the doctrine.[2] The sum of the people, replacing the king, could have taken his place in the continuation of the maxim, altered to read "The People can do no wrong." But the "people" is too intangible an idea to afford a working hypothesis for legal relations; nor is it capable of arousing the respect that the mere antiquity of the Crown evokes. At first there was no idea of justifying irresponsibility as the necessary attribute of a juristic person, the State. Admitting for the sake of argument that the State was conceived of as a juristic person, it was not until some hundred and fifteen years after the adoption of the Constitution that irresponsibility was, in a judicial decision, placed upon that ground.[3]

Of the origin of this doctrine of immunity in the United States, about all that can with certainty be said is that, at the time the Constitution was adopted, it was the clear understanding of the principal advocates of the Federal Union that the individual states would not thereby be subjected, against their will, to the suits of individuals. This applied, of course, with even greater force to the central Government.

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[1] See Karl Singewald, "The Non-suability of the State in the United States," in Johns Hopkins University Studies in Historical and Political Science, Series xxviii, No. 4, primarily a study in constitutional law; of the position of the individual states of the Union, under the Constitution.

[2] Cf. R. Bonnard, De la Responsabilité Civile des Personnes Publiques et de leurs Agents, pp. 79-81.

[3] In Kawananakoa v. Polyblank, 205 U. S. 349, 353, 51 L. Ed. 834.

Hamilton considered that a State[4] could not be made amenable to suits against its consent because such exemption was "inherent in the nature of sovereignty." This was the "general sense and the general practice of mankind" and in the interval between the Revolution and the Constitution was enjoyed by all the states. The conscience of the sovereign was the only guarantee enjoyed by the individual in his relations with the nation.[5]

Madison was equally as emphatic on the inability of an individual to hail a state before a court.[6] Marshall expressed the same view, considering it irrational to suppose that a state could be made a defendant. He saw a difficulty (probably of the enforcement of a judgment)[7] in making a state a defendant that did not appear when the state assumed the role of plaintiff.[8]

The immunity of a state was assumed as a matter of course. At the Revolution, England was practically the only known country where popular participation in government existed even in a very attenuated form, and even there the subject was deprived of a right of action against the State under the legal theory that the king, the head of the State, could do no wrong. In other countries the famous statement attributed to Louis XIV closely approximated the truth; the King *was* the State; an individual possessing, not merely exercising, supreme control, whose command was law, and whose courts were his as much as his lands. It thus seems probable that the doctrine of state immunity was accepted rather as an existing fact by the people of the states, than adopted as a

[4] A state of the Federal Union was meant, but the argument used by Hamilton, as well as the other authorities, applied with as much or as little justification to the Federal Government, or any State in the world. It was conceded that except as limited by the Constitution, the states of the Union retained all the powers and attributes of independent states; hence the arguments later cited in favor of the immunity of the states on principles of public law have equal applicability to the Federal Government.

[5] Federalist No. 81.

[6] 3 Elliott's Debates on the Federal Constitution 2 ed., 533.

[7] This difficulty did not deter him from deciding Worcester v. Georgia.

[8] Elliott, op. cit. 555-556.

theory. It was a matter of universal practice, and was accepted from the mother country along with the rest of the common law of England applicable to our changed state and condition. This conjecture seems verified by the fact that in the earlier court decisions the doctrine is accepted as existing, but not explained or justified other than on the basis that what is, is right.

The States of the Union were at the time of the adoption of the Constitution heavily indebted. They had no intention of being forced to pay these debts by court proceedings, and would quite probably have refused to adopt the final draft of the Constitution had not they, or rather their people, been assured that no diminution of the sovereign right to be dishonest would be suffered. This assurance was needed, for the wording of the judiciary article certainly seemed broad enough to sanction suits by individuals against not only the states, but the United States. The second section of the grant of judicial power read:

> The judicial power shall extend . . . to controversies to which the United States is a party; to controversies . . . between a state and citizens of another state.[9]

Now the United States would be equally a party whether plaintiff or defendant; a controversy between a state and citizens of another state is equally a controversy, whichever side of the docket bears the name of the state. Unless some reservation is read in, the sovereign power is placed, in its own courts, on the same footing as the meanest citizen. If the State had been visualized merely as the totality of its citizens, suit by one against the group would not have been logically inconceivable. But in any event, it was claimed, a reservation was to be read into the wording of the Constitution. The grant of judicial power, it was said, was to be construed as limiting the controversies to that class of controversies heretofore recognized by public law; a class in which the state (king) without its consent never appeared in

[9] U. S. Constitution, Article III, Sec. 2.

the position of defendant. Such, as we have seen, were the assurances of Hamilton, Madison and Marshall.

There were those, however, who trusted to the strict wording of the constitutional provision rather than to the interpretation of its framers. In 1793 a suit in assumpsit was begun in the Supreme Court against the State of Georgia by Chisholm, who was, and whose testator at the time of his death was, a citizen of South Carolina. The court decided, four to one, that the action was maintainable. Iredell, the only dissenting justice, based his opinion on the ground that at common law the sovereign power, in England the king, in this country the States and the United States, could not be sued without its consent; this doctrine of the common law had been accepted in this country.[10] The four majority judges delivered separate opinions, though all agreed a state could be sued. Three Justices, Cushing,[11] Wilson,[12] and Jay[13] placed their decision squarely on the principle that any state by its nature was subject to suit; one, Blair,[14] decided on the ground that the states by adopting the Constitution agreed to its provisions which provided for suits. Two of the justices recognized that a parity of reasoning would subject the United States to suit also.

A wave of apprehension spread over the country at this unheard of and totally unexpected deviation from the accepted course of non-judicial adjustment or judicial non-adjustment of state debts. The Eleventh Amendment was quickly proposed and unanimously adopted, preventing any state from being sued by a citizen of another state, and, by judicial interpretation, of the same state.[15] The purpose of the amendment was not, however, to vindicate Iredell's inter-

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[10] Chisholm v. Georgia, 2 Dall. 420, 1 L. Ed. 440. Opinion by Iredell 2 Dall. 430-450.

[11] Ibid, 466-469.

[12] Ibid, 453-463.

[13] Ibid, 469-478.

[14] Ibid, 452.

[15] U. S. Constitution, 11th Amendment, and Hans v. Louisiana, 134 U. S. 11.

pretation of the common law immunity of the State, nor because the nation was at all concerned about legal theory. It was not to preserve the sovereignty of States from the degradation of compulsory appearance before the Federal courts, but to protect the states from their creditors, that the amendment was passed.[16]

This amendment established the immunity of a State of the United States. It did not in any way affect theories; nor, in words, the position of the Federal Government. It would scarcely be expected, however, that, after the stinging rebuke administered to the judges for their interpretation of the status of a State at common law, there would be necessity for similar direct action if an attempt were made to make the Federal Government a defendant. The first positive indication of the judicial attitude, showing that the Supreme Court had learned its lesson, was given in 1821 by Marshall by way of dictum in a great case pending before the court. He reiterated the opinion expressed by himself in the constitutional convention, in a simple statement, without argument.

> The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.[17]

In 1846, a judgment debtor who claimed he had paid his judgment, which allegation was substantiated by the auditor, obtained an injunction against the United States to prevent collection of the judgment, and also secured a judgment for costs. The case was reversed in the Supreme Court, MacLean, J., giving the laconic reason:

> There was no jurisdiction of this case in the Circuit Court, as the Government is not liable to be sued except with its own consent, given at law.[18]

Another suit in Equity against the United States, four

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[16] Cohens v. Virginia, 6 Wh. 264, 406, 5 L. Ed. 257, opinion by Marshall, Ch. J.

[17] Cohens v. Virginia, 6 Wh. 264, 412, 5 L. Ed. 257.

[18] U. S. v. McLemore, 4 How. 286, 288, 11 L. Ed. 977.

years later, describes the doctrine of non-suability as a 'maxim'[19] and thus disposes of the case:

> No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign or a government representing the sovereign cannot ex delicto be amenable to its own creatures or agents (the courts) employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only on the ground of permission on the part of the sovereign or the government expressly declared. . . .[20]

Even Chief Justice Taney was content to define the doctrine as "an established principle of jurisprudence"; with the others, he seems to have felt that long duration had extinguished the need for explanation or justification.[21]

It will thus be seen that for the first seventy years the doctrine of sovereign immunity was accepted without hesitation, except in one instance, and without the recognition of any necessity for explanation. Other countries, whose theories of the relation of the governors to the governed differed from ours, used the theory. We adopted it without considering whether it was valid, essential, or desirable. It could not be expected that this slavish adherence to precedent would indefinitely satisfy even the judicial mind. The doctrine was well established; then came attempts, ex post facto, to explain it. Historically there seems no other explanation than simply it was accepted by us as something belonging to the normal course of things. Now however, its justification was sought to be placed upon logical grounds. Finding the doctrine in existence, the attempt was now to be made to justify[22] it on grounds that would induce a reasoning person to accept it into our jurisprudence if it were for the first time seeking admission. Expediency, the proper performance of public

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[19] "A maxim is the short and formal statement of an established principle of law" (Robinson, Elementary Law, p. 4, s. 7). Calling a theory a maxim is obviously an easy manner of escaping a discussion of its merits.

[20] Hill v. U. S., 9 How. 386, 389, 13 L. Ed. 185.

[21] Beers v. Arkansas, 20 How. (61 U. S.) 527, 15 L. Ed. 991.

[22] For further discussion of these 'justifications' see Chapter XII.

duties, it was said, required the doctrine.[23] Equally as good authority denied that was the real reason for its adoption.[24]

The expediency doctrine soon gained recognition in two Supreme Court decisions in 1868, in the second of which it was said, attempting to combine expediency and antiquity:

> It is a familiar doctrine of the common law that a sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the superior authority could be subjected to suit at the instance of every citizen, and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government. . . . This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. . . .[25]

In a somewhat later case, the court expressly repudiated the theory that the maxim, "The King can do no wrong" applies to the American Government; but the same result is obtained by the adoption of a policy "founded in wisdom" which prevents suits against the United States.[26] In United States v. Lee the general doctrine was admitted, but given its true historical setting in this country; it was accepted as a part of the "general doctrine of publicists"—nothing more, nothing less. Justice Miller continued that:

> . . . while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts, has since that time (Cohens v. Virginia) been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.[27]

Justice Miller felt that it was "difficult to see on what

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[23] Briggs v. Lightboats, 11 Allen, 157, 162.

[24] U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 172, 177.

[25] The *Siren* v. U. S., 7 Wall. 152, 19 L. Ed. 129. The other case was Nicholl v. U. S., 7 Wall. 129, 19 L. Ed. 125. Though conceivably this argument might serve as a justification ab inconvenienti, it is submitted that the court is mistaken in supposing that 'public service' had anything to do with the origin of the doctrine, or its acceptance into this country.

[26] Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010.

[27] 106 U. S. 196, 27 L. Ed. 172, 176, Miller, J.

solid foundation of principle the exemption from liability rests." [28] The petition of right in England afforded a substantial remedy to the subject; here Congress was the only body that could consent to suit, and the difficulty of obtaining action from that, as from any other legislative group, was well known. Nor was there any difficulty about service of writs here; even if the king could not summon himself, that was no reason why writs should not run in the name of the President against the Attorney-General. Further, there is a broad and well-marked difference in the whole theory of government in the two countries; here the people are sovereign.[29] The dissenting justices reiterated the applicability of the doctrine to the United States, as "essential to the common defense and general welfare." [30]

This same public policy would equally forbid the suability of the United States without its consent by one of the constituent states.[31]

It is not until 1906 that, for the very first time, we hear a justification of this doctrine, heretofore received as a matter of course, as a logical necessity arising from pure political theory. It is "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." [32] There is reason to question whether the enunciation of this theory was necessary to the decision of the case, but whether dictum or not, it was accepted by the same justice as the basis of his decision in a quite recent case,[33] and despite the unusually forceful dissent there voiced, it must be considered, for the time being at least, as the recognized doctrine [34] of sovereign immunity in the United States.

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[28] 27 L. Ed. 177.
[29] 27 L. Ed. 172-183.
[30] 27 L. Ed. 184.
[31] Kansas v. U. S. 204 U. S. 331, 51 L. Ed. 510.
[32] Holmes, J., in Kawananakoa v. Polyblank, 205 U. S. 349, 353, 51 L. Ed. 834.
[33] *Western Maid*, 257 U. S. 419, 66 L. Ed. 299. (1922).
[34] See, however, Chap. IX, pp. 134-136.

Whether it be that the people can to no wrong, or that "public policy" requires it, or that no law can bind the lawgiver, or that the unthinking acceptance of outworn and inapplicable doctrines by early judges has crystallized into binding precedent, the result is the same; the United States cannot be sued without its own consent.

CHAPTER VI

The United States Before Its Own Courts [1]

Though no sovereign State may be sued without its consent,[2] and consequently when it consents to be sued may impose any restrictions it desires,[3] when the State assumes the role of plaintiff, it does not occupy quite the same favored position, with the result that it may be met by many of the defenses, complete or partial, that could be pleaded in an ordinary action. The further question frequently arises as to when a State is really a party. At first the courts took the view that for a State to be considered a party, it must appear as such on the record; if it did not, then regardless of how much its interest was affected by the outcome, it would not be considered a party.[4] After nearly a hundred years, the doctrine was changed, so that if the decree of judgment in fact affects the interest of the State the State is a party, even though bringing in the State serves ipso facto to defeat the suit by ousting jurisdiction.[5] In examining the position of the United States before its courts, the state precedents will usually be of considerable value, for, except as modified

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[1] Apart from special statutory provisions, to a consideration of which Chap. vii is devoted, and of the distinctive admiralty doctrines, treated in Chap. ix. On this general subject, see Jacob Trieber, The Suability of the State by Individuals in the Courts of the United States, 41 American Law Review, 844; Karl Singewald, The Non-Suability of the Sovereign State in the United States, Johns Hopkins Stud. in Hist. and Pol. Science, Ser. xxviii, No. 3, primarily a thesis on constitutional law and the suability of the individual state of the American Union; Goodnow, Administrative Law, p. 379 ff; Burdick, the Law of the American Constitution, p. 93 ff; Willoughby, United States Constitutional Law, chaps. liii, liv.

[2] Briscoe et al v. The Bank of Kentucky, 11 Pet. 284, 321.

[3] Below, Chap. vii.

[4] Bank of the U. S. v. Planters Bank, 9 Wh. 904, 6 L. Ed. 244; Story, Commentaries on the Constitution of the United States, sec. 1679.

[5] Louisiana v. Jumel, 107 U. S. 711.

by the Constitution, the states still retain sovereignty, with its attribute of judicial immunity.[6]

The United States is a body politic and corporate.[7] As any other corporation, it has the right to invoke all common law remedies, and to sue to enforce contracts and protect its property either in state or federal courts,[8] though when forced to resort to the courts it may to some extent be controlled by the ordinary rules applicable to private persons.[9]

So the United States may enter into all contracts appropriate to the just exercise of its corporate powers,[10] as the acceptance of surety bonds,[11] or as endorser or endorsee of negotiable paper.[12] Since as any other corporation it can act only through its agents, their knowledge is, sometimes at least, imputed to it; for example, where a sub-treasurer received funds known to have been impressed with a trust, the United States took subject to that trust.[13] In another case, the Secretary of the Treasury was authorized to sell vessels stricken from the navy list, to the highest bidder; the President, under his war powers, authorized sales by the Secretary at a price approved by him. A ship was advertised, and one bid of $5,150 was received, the money paid, and a bill of sale executed. Later it was found that another bid of $6,500 had been offered, but had been misplaced by mistake. Suit was brought by the higher bidder to compel conveyance to him. In response to a bill of interpleader filed by the government, the Supreme Court decided that the practice of ordinary business bound the United States by the ostensible authority given to the Secretary, and that his action of disposing of the vessel bound the government.[14]

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[6] U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 172.
[7] U. S. v. Maurice, 2 Brock. (Cir. Ct.) 94, 109.
[8] Cotton v. U. S., 11 How. 229, 231, 13 L. Ed. 675.
[9] Goodnow, Administrative Law, p. 379.
[10] U. S. v. Tingey, 5 Pet. 115, 128, 8 L. Ed. 66.
[11] Ibid.
[12] Dugan v. U. S., 3 Wh. 172, 4 L. Ed. 362.
[13] U. S. v. State Bank, 96 U. S. 33, 24 L. Ed. 647.
[14] U. S. v. Levinson, 258 U. S. 198, 66 L. Ed. 563, rev. 267 Fed. 692.

The immunity of the United States from suit extends to all cases, even those of suits by the member states,[15] but the converse is not true. The states, though immune from suits at private hands[16] are suable at the instance of the United States.[17]

For the United States to participate as plaintiff in any suit, it need not have a pecuniary interest in the controversy; it is sufficient if it is acting as guardian.[18] This has often occurred in regard to the Indian tribes, even where the Indians had acquired full American citizenship.[19] So it can sue to restrain the collection of taxes on Indian lands,[20] or to enjoin interference with the mails and interstate commerce,[21] or where it is under an obligation to give a good title to a party whose right is obstructed by a patent.[22]

Naturally exempton of the sovereign from suit extends as well to equitable proceedings as to those at common law, following out the principle that the sovereign is immune from any process in his own courts. Accordingly no injunction could be obtained to prevent further collection on a judgment by the United States, on the ground that such judgment had already been paid.[23] In that case, however, no injustice was worked, for the Supreme Court, while reversing the decree of the Circuit Court granting the injunction, explained that the Circuit Court did have jurisdiction to order the judgment marked satisfied, and, while investigating to see if it had in fact been satisfied, could direct a stay of execution.[24] Similarly an injunction to restrain the collection of a judgment on a negotiable instrument, on the ground of outstanding equities to which the note was subject, was refused.[25]

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[15] Kansas v. U. S., 204 U. S. 331, 51 L. Ed. 510.
[16] 11th Amendment, and Hans v. Louisiana, 134 U. S. 1.
[17] U. S. v. Texas, 143 U. S. 621, 36 L. Ed. 285.
[18] Heckman v. U. S., 224 U. S. 413, 438, 56 L. Ed. 820.
[19] McKnight v. U. S., 130 Fed. 659, 55 C. C. A. 37.
[20] United States v. Rickert, 188 U. S. 432, 47 L. Ed. 532.
[21] In re Debs, 158 U. S. 564, 39 L. Ed. 1091.
[22] United States v. Hughes, 11 How. 552, 13 L. Ed. 809.
[23] United States v. McLemore, 4 How. 386, 4 L. Ed. 977.
[24] Ibid, p. 288.
[25] Hill v. U. S., 9 How. 386, 13 L. Ed. 185.

North Carolina had subscribed to railroad stock, to pay for which bonds were issued, pledging the public faith, the stock itself, and any dividends. In a suit against the railroad by a holder of these bonds to have them declared a lien, and to compel payment of dividends to the bondholders, the court said that even if the bondholders did have a lien, it was unenforcible without a suit and as the state was a necessary party to such a suit, the claim was unenforcible.[26] So where a state took a lien for endorsing railroad bonds, and then had a receiver appointed and the road sold to the state, the second mortgagees could not foreclose, for the state had become a necessary party.[27] But the fact that a sovereign State may hold title to a portion of mortgaged property, will not prevent a foreclosure of the mortgage on that part not held by the state.[28] It would seem, also, that the United States in prosecuting a suit at common law would be subject to the effects of a prior equity proceeding treating the same subject matter. The United States had filed a suit on a bond, to which several other claims had attached. The surety had instituted proceedings to compel a marshalling; the court refused to restrain the suit at common law, because it thought the same defences would be available there as in equity, but postponed the motion of the surety, without dismissing it, in case equitable relief proved necessary.[29]

The United States is not bound by statutes unless expressly mentioned in them, except where the statute is so plainly intended for the public good, and the promotion of justice, that the United States can be presumed to intend to submit to it. An example of an application of this seldom invoked exception is found in a case where the act of Congress, conforming process on judgments and decrees of the federal courts to those of the state courts, was held to include judgments rendered in favor of the United States, even though not ex-

[26] Christian v. Atlantic & N. C. R. R., 133 U. S. 233, 33 L. Ed. 589.
[27] Cunningham v. Mason, 109 U. S. 446, 27 L. Ed. 992.
[28] Kawananakoa v. Polyblank, 255 U. S. 349, 51 L. Ed. 834.
[29] United States v. American Surety Co., 110 Fed. 913.

pressly mentioned.[30] But the United States is not bound by any Statutes of Limitations, unless expressly included.[31] This is not through any fiction of the king or sovereign being so busied with the public good that he has not leisure to assert his rights within the usual time, but on the ground of public policy; that the public rights, revenues and property shall not be injured by the negligence of officers.[32] Statutes now limit the time within which a suit may be commenced against a surety[33] or an action to vacate or annul land patents may be brought by the Government.[34]

When the United States must resort to an equitable action, it seems that the doctrine of laches will be applied, and if the United States after discovery of a mistake, delays action with the result that the party liable is prejudiced, as by loss of remedy over against another party, "laches may be imputed to the United States, and recovery will be barred. Where the action is in equity, the government must show it is equitably entitled to relief."[35] He who seeks equity must do equity; at least one state court has held the state barred by laches.[36]

The doctrine of exemption from limitations, it should be added, can be invoked by the United States only where its own interests are involved; it cannot by permitting the gratuitous use of its name extend its immunity to a private person.[37] It cannot be a mere conduit for purposes of litigation between private parties.[38] Nor can it acquire from an individual better rights than that individual had[39]; that is, though limitations do not run against the United States this exemption will not raise the bar if the statute has run while the

[30] U. S. v. Knight, 14 Pet. 301, 10 L. Ed. 465.
[31] U. S. v. Nashville R. R., 118 U. S. 120, 30 L. Ed. 81.
[32] U. S. v. Hoar, 2 Mason (C. C.) 312, 314.
[33] 25 Stat. L. 387. Comp. St. 3292.
[34] 33 Stat. L. 64, Comp. St. 5114.
[35] U. S. v. Union National Bank, 28 Fed. Cas. No. 16,597.
[36] State of Iowa v. Livingston, 145 N. W. 91.
[37] Curtner v. U. S., 149 U. S. 662, 37 L. Ed. 890.
[38] U. S. v. Beebe, 127 U. S. 338, 32 L. Ed. 121.
[39] Except of course on the general doctrine of a bona fida purchase of negotiable paper cutting off equities.

claim was in private hands. Such a claim acquired from an individual and barred by limitations at the time of acquisition by the government, is equally unenforcible in the hands of the United States.[40]

If the Statutes of Limitations do not apply to the United States, it is manifest that adverse possession, predicated on the loss of a right of action by long delay, can never divest the title of the United States, for the time within which it may bring suit is unlimited. Mere occupancy of public land and placing of improvements thereon gives no vested right to the settler or his assignee as against the United States, nor does any claim arise for the value of the improvements.[41]

The United States may in some cases at least be subject to the doctrine of estoppel. Suit had been brought to vacate certain patents, but a verdict had been rendered for the defendants as bona fide purchasers for value without notice. The government then brought suit to vacate them on the ground that they were within the Indian lands. The Supreme Court held that the former action constituted a bar to the present one; the United States was estopped to bring the same suit in a different form.[42]

Where the United States or a state becomes a stockholder in an ordinary business enterprise, or engages in commerce, it appears an action against such commercial agency will not be considered a suit against the State. An action was allowed against a bank chartered on behalf of, and all of whose stock was owned by, a state.[43] In a leading case, where suit was instituted against a bank in which a state held some shares, Chief Justice Marshall said:

> It is, we think, a sound principle, that when a government becomes a party in any trading company, it devests itself, so far as

[40] U. S. v. Buford, 3 Pet. 12, 7 L. Ed. 585.

[41] Sparks v. Pierce, 115 U. S. 408, 29 L. Ed. 428.

[42] U. S. v. California & Oregon Land Co., 192 U. S. 335, 48 L. Ed. 476. Marshall in The Venus, 8 Cr. 317, 3 L. Ed. 575, spoke of the Government as being 'estopped' in an action to confiscate the land of a naturalized citizen from treating him differently from a native born citizen.

[43] Briscoe v. Bank of Kentucky, 11 Pet. 284.

concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates, and to the business which is to be transacted.[44]

Suits were allowed against the Emergency Fleet Corporation to set aside a contract executed under duress, and for an accounting [45] and for a tortious act,[46] although all the stock of the Corporation was owned by the United States. The Corporation was merely an agency, and as such, liable. The fact that all the property of the Corporation had been taken over by the Shipping Board, a body not amenable to suit, might affect the value of the remedy, but not the jurisdiction of the court.[47] So a conspiracy against a railroad operated under its old organization, but all of whose shares were owned by the United States, was not a conspiracy against the United States, within the provisions of the Revised Statutes.[48]

Business requires that commercial paper shall be capable of easy circulation, to which end a definite system of commercial law has been developed. When the United States becomes a party to negotiable instruments it has all the rights and incurs all the responsibilities of individuals who are parties to such instruments except that the United States is not subject to suit.[49] So in an action of assumpsit against a bank for a balance due from government deposits the bank was entitled to set-off the negotiable paper of the United States held by it.[50] Where the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." [51] So where the proper governmental offi-

[44] Bank of U. S. v. Planters Bank, 9 Wh. 904, 907, 6 L. Ed. 244.
[45] Sloan Shipyards Corp. v. Emergency Fleet Corp., 42 S. Ct. 386.
[46] Astoria Marine Iron Works v. Emergency Fleet Corp., 258 U. S. 549, 66 L. Ed. 762.
[47] Ibid.
[48] Salas v. United States. 234 Fed. 482, 148 C. C. A. 440.
[49] Beers v. U. S., Dev. Ct. Cl. 113, s. 454.
[50] U. S. v. Bank of the Metropolis, 15 Pet. 377, 10 L. Ed. 774.
[51] Cooke v. U. S., 91 U. S. 389, 23 L. Ed. 237.

cer failed, for one day, to give notice of the dishonor of bills of exchange purchased by the United States, that delay discharged the drawer.[52] Where money was paid from the treasury to an innocent collection agency on the forged signature of a government officer, the United States could not recover against the collector [53]; it was bound by the principle that one who accepts forged paper purporting to be his own, and pays it out to a holder for value, cannot recover.[54]

No court can, in the absence of statute, give a direct judgment or decree against the United States for costs or expenses, in a suit to which the United States is a party.[55] This is true even under the Conformity Act, assimilating the procedure in the federal courts to that of the states "as near as may be," [56] so that, though unconsummated condemnation proceedings in a state court may carry costs against the state government, this does not apply to the federal government in the federal courts for the same state.[57] The awarding of costs seems to be considered in the light of a suit against the State.[58] An interesting case illustrates the analogous doctrine as to interest. Judgment which was unpaid had been rendered against a post master in 1870; before this time, a salary readjustment had been made that entitled the postmaster in question to a considerable increase, but the officer in charge of such change did not discover this until 1886. From the fund thus found due, the United States subtracted the judgment plus sixteen years interest, but did not allow interest on the salary that had been withheld. The court admitted this was inequitable, but said:

> An inherent vice of the petitioner's argument is the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings public policy demands that the government should occupy an apparently favored position.

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[52] U. S. v. Barker, 4 Wash. C. C. 464, 12 Wh. 559.
[53] U. S. v. Cooke, 25 Fed. Cas. No. 14,854.
[54] Cooke v. U. S., 91 U. S. 389, 23 L. Ed. 237, 242.
[55] The *Antelope*, 12 Wh. 550, 6 L. Ed. 723.
[56] Rev. St. 914.
[57] Carlisle v. Cooper, 64 Fed. 472, C. C. A. 2d.
[58] U. S. v. McLemore, 4 How. 286, 288, 11 L. Ed. 977.

It may sue, but except by its own consent, cannot be sued. In the matter of costs it recovers but does not pay, and the liability of the individual would not be affected by the fact he had a judgment against the government which did not carry costs.[59]

Set-off, a cross suit or action, cannot be maintained against a State. The object of set-off in private suits is to prevent circuity of action. As no action will lie against the State, obviously to allow set-off is, not to prevent circuity, but to create an affirmative right of action not otherwise possessed.[60]

The United States in 1797 passed an act allowing set-offs in suits by the government against individuals, if such claims had been presented to the accounting officers and disallowed, or if the defendant could prove his present possession of vouchers not before within his possession, or that he was prevented from presenting them at the Treasury by absence from the country, or by unavoidable accident.[61] The terms of the act are broad enough to cover both legal and equitable claims; the purpose of the act seems to have been to allow a complete settlement of accounts between the parties.[62] Accordingly set-off was allowed for the value of supplies furnished in addition to contract amounts[63]; for poundage fees lost by a marshall when the prisoner was pardoned before the marshall could collect such fees[64]; and for work done not in pursuance of a statute, but under the express sanction of the head of the Navy Department.[65] But a claim for unliquidated damages could not be applied as a set-off even as between individuals, and so is not available against the United States.[66]

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[59] U. S. v. Verdier, 164 U. S. 213, 218, 219, 41 L. Ed. 407.

[60] State v. Baltimore & Ohio R. R., 34 Md. 344, 350—Brief of counsel, adopted by court p. 374; Commonwealth v. Matlack, 4 Dall. (Pa. Sup. Ct.) 303, 1 L. Ed. 843.

[61] Rev. St. 951, Comp. St. 1588. In U. S. v. Giles, 9 Cr. 212, 228, 3 L. Ed. 708 the requirement of presentation to the accounting officers and rejection by them was limited to suits against officers only.

[62] U. S. v. Wilkins, 6 Wh. 135, 144, 5 L. Ed. 225.

[63] Ibid.

[64] U. S. v. Ringgold, 8 Pet. 150, 8 L. Ed. 899.

[65] U. S. v. MacDaniel, 7 Pet. 1, 8 L. Ed. 587.

[66] U. S. v. Robeson, 9 Pet. 319, 9 L. Ed. 142.

No affirmative judgment may be rendered on a set-off against the United States[67]; a set-off may be used to diminish, or even extinguish the alleged indebtedness of the defendant, but not to secure a judgment for an excess of the set-off over the original claim.[68] The United States on the other hand may recover a judgment on a set-off,[69] for example, for amounts previously paid the plaintiff by mistake.[70] A debt for an import duty is a personal obligation, independent of a lien on the goods or collateral security, and may be set-off by the United States against a sum due the debtor under a treaty.[71]

The sovereign may not be directly impleaded; but the effect of this theory may be greatly weakened if the sovereign may be proceeded against indirectly through attacks on his property.[72] A Massachusetts statute gave a lien on vessels for labor and materials furnished, enforcible by petition to the Superior Court. Such a petition had been filed, alleging the furnishing of materials for a lightboat, since transferred to the United States which was at that time her owner, subject to the lien. The petition concluded with a prayer for attachment and sale, and a writ of attachment issued. The United States appeared specially, and pleaded to the jurisdiction. The court found that the United States had taken possession and paid the builder, but the lien for materials had not been satisfied. But, said the court "The question now argued is not of the petitioner's title, but of the mode of asserting it; not of right, but of remedy. The United States do not deny that they took their title subject to the lien of the petitioners," but they did deny their amenability to suit. The court considered this was not a suit against public officers, but against the government itself, and agreed that

[67] Reeside v. Walker, 11 How. 272, 290, 13 L. Ed. 693.
[68] U. S. v. Eckford, 6 Wall, 484, 18 L. Ed. 920.
[69] McElrath v. U. S. 102 U. S. 426.
[70] U. S. v. Sanders, 79 Fed. 407, C. C. A. 1st.
[71] Meredith v. U. S., 13 Pet. 486, 10 L. Ed. 258. Consideration of insolvency and bankruptcy provisions omitted from this edition.
[72] See above, note 1.

such a suit could not be maintained. Although Chief Justice Gray, in the course of his opinion, gives a splendid account of the doctrine of sovereign immunity, the basis of the decision in the case was really the fact that the vessel had come into the actual possession of the government, and was destined "for public objects only, and unsuitable for any other," hence immune.[73]

It would seem, however, that if property were subject to a lien, then acquired by the United States and sold, the purchaser would be in no better position than if he had bought from a private individual. Certain property was mortgaged and the equity of redemption was assigned to Swartout. He became a government defaulter, and the lot was seized, sold and bought in by the United States. While still in the hands of the government, the New Jersey court, where the land lay, entertained a bill to foreclose the mortgage. Notice was served on the United States attorney and the land was then sold to the present defendant. Later the government purported to sell the same property to the plaintiff, with knowledge of the foreclosure sale, who then in the United States Circuit Court for the district of New Jersey instituted ejectment proceedings. The judgment, delivered by Grier, Circuit Justice, was for the defendant. He held that it was not true that

> when the government officers purchase land in the name of the United States to secure a debt, as any individual or private corporation might do, that it . . . in any manner affects the liens or rights of mortgagees of such lands. In the mere exercise of a corporate right, the government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to congress to redeem. . . . When the Government in the exercise of the rights and functions of a civil corporation, purchases lands to secure a debt, the accident of its sovereignity in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands.

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[73] Briggs v. Lightboats, 11 Allen (93 Mass.) 157, 161, 164. See Ballaine v. Alaska Northern Railway, 259 Fed. 183, for a somewhat similar ruling as to a railroad purchased by the government. The correctness of this latter decision was sharply questioned in 269 Fed. 320.

It may be said there is no precedent in this country for precisely such a case as that before the chancellor. The answer to this may properly be, "It is time there was one." [74]

A bond had been given to a state by a railroad as a condition for securing a charter. When it was declared forfeited for non-compliance with the charter provisions, the railroad instituted a suit in equity to have the bond cancelled as ultra vires. A demurrer to the suit was overruled, and then the state intervened as a claimant for the fund that had been paid into court. The Supreme Court accordingly refused to pass on the demurrer, but ruled that the state by participating in the suit had waived any objection, and the case could be determined on its merits.[75]

There is no doubt that government funds cannot be attached. The purser of the frigate *Constitution* had in his hands money due the seamen as wages. This was attached in the state courts, but under order of the Secretary of the Navy, was paid to the seamen in disregard of the attachment. The Supreme Court quashed proceedings against the purser for his refusal to obey the attachment, saying that to permit such restraint would be "found embarrassing or perhaps fatal" to the public service.[76]

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[74] Elliott v. Van Voorst, 8 Fed. Cas. No. 4390, pp. 538, 540.

[75] Clark v. Bernard, 108 U. S. 436, 27 L. Ed. 780.

[76] Buchanan v. Alexander, 4 How. 21, 11 L. Ed. 857. Consideration of problems presented by government control in war period omitted from this edition of this monograph.

CHAPTER VII

The United States as Defendant: Statutory Provisions

THE COURT OF CLAIMS

There has been in the United States no method of redress corresponding to the English Petition of Right. This is perhaps due to the fact that there is no officer in this country corresponding to the king, with authority to subject the United States to suit; this can be done by the Legislature alone.[1] Occasionally Congress had authorized the submission for adjudication of a particular class of claims to a definite tribunal outside its wall,[2] but usually the claimant would present his claims directly to Congress for its consideration, and seek compensation in a money appropriation. This was plainly an undesirable system; Congress was overburdened with matters of private concern that required judicial investigation rather than legislation. Then there was no assurance that just claims would be paid, or that unjust claims would be detected, or if detected, would be rejected. Claims might be passed by one House and rejected by the other; they would drag on until the amounts became too great for relief.[3]

There was no particular reason why the matter should not have been treated judicially; Congress certainly had the power to refer such cases to the ordinary courts, but from indifference, or failure to realize the gross injustice so often perpetrated, for many years had failed to act. The representative of the sovereign could waive the sovereign's immunity from suit; as it could, further, impose any restrictions it desired on the privilege of bringing suit,[4] there need have been no anxiety.

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[1] U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 172, 176-177.

[2] U. S. v. Clarke, 8 Pet. 436, 8 L. Ed. 1001—Florida claim.

[3] It might be asked if one with a just claim should be forced to come asking as a matter of grace what in an advanced state of social progress he could demand as a matter of right.

[4] Beers v. Arkansas, 20 How. (61 U. S.) 527, 15 L. Ed. 991.

It was not until 1855 that any attempt to systematize the adjustment of claims by reference to a court was made, and even then the Legislature could not be accused of moving with undue haste, but "proceeded slowly and with great caution." [5]

On the 6th of December, 1854, a bill was introduced in the Senate creating a committee to examine and adjust private claims. After two readings it was referred to the Committee on Claims, and shortly afterward was reported back without amendment. During further debate, proposals were made to amend the bill so as to provide for a court rather than a committee. These in turn were again referred to the Committee on Claims, which within two days reported out a bill providing for a court. This report was accepted by the Senate without a dissenting vote, was passed by the House on the 23rd of February, 1855, by a vote of 150 to 46, and was signed by the President.[6] The court was established "for the triple purpose of relieving Congress, and of protecting the Government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims." [7]

The Act, after authorizing the appointment of three judges, provided:

> The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by petition filed therein; and also all claims which may be referred to said court by either House of Congress.[8]

The court was to send reports to Congress at the beginning of each session and each month thereafter during the session.

[5] Langford v. U. S. 101 U. S. 341, 25 L. Ed. 1010, 1012.

[6] William A. Richardson, History, Jurisdiction and Practice of the Court of Claims, pp. 5, 6. This article has been printed in pamphlet form, and may also be found in volume 17 of the Court of Claims Reports. See also, King, Claims against the Government, American Law Reg. & Rev. 32: 999; Burdick, The American Constitution, pp. 111-12; Goodnow, Administrative Law, 388-390.

[7] U. S. v. Klein, 13 Wall. 128, 20 L. Ed. 519, 525.

[8] 10 Stat. L. 612, s. 1.

Though called a court, it was authorized only to draw bills which if passed by Congress would carry into effect the decisions that the court had made.[9] With these drafts of bills were sent the briefs filed and all the testimony. Claims favorably reported were referred to the Committees on Claims; those rejected were placed on the calendars. The Claims Committees felt it their duty practically to retry all those reported favorably by the court before referring them to the Houses, so that about all the "Court" of Claims really did was to act as an auditing board.[10]

This continued until 1863, when the court was reorganized. The judges were increased from three to five; the court was to give "final judgments and decrees," with appeal to the Supreme Court by the claimant where the amount involved exceeded $3,000 and by the defendant in any case. Judgments were to be paid out of any general appropriation for private claims on presentation to the Secretary of the Treasury of a judgment signed by the clerk and the Chief Justice. It was no longer necessary to send to Congress records, evidence and briefs. However, it was further provided that no money should be paid out until an appropriation was estimated therefor by the Secretary of the Treasury. This at least by implication gave him the right of revision, and would have made him the final arbiter, even on appeals decided by the Supreme Court. It was held by that body that this revisory power deprived the Court of Claims of its judicial nature; consequently no appeal could be entertained.

> We think that the authority given to the head of an Executive Department by necessary implication in the . . . amended Court of Claims Act, to revise all the decisions of that Court requiring the payment of money, denies to it the judicial power from the exercise of whom alone appeals can be taken to this court.[11]

This objectionable feature was speedily removed by the Act of March 17, 1866,[12] since which time the Supreme Court

[9] Ibid, s. 7.
[10] Richardson, p. 8.
[11] Gordon v. U. S., 2 Wall. 561, 17 L. Ed. 921, 922.
[12] 14 Stat. L. 9.

has entertained appeals from all cases within the general grant of power.

Other acts from time to time have extended the jurisdiction of the court, but the provisions for suits on contracts have been decidedly the most prolific source of litigation. In 1887 an act apparently greatly enlarging this jurisdiction of the court was passed, but in order to understand the true significance of this later legislation, it is necessary to examine the judicial interpretation of the clause allowing cognizance of claims founded upon a law of Congress, or a contract, express or implied.

Law of Congress.—Where an officer's salary has been fixed by a permanent statute, his claim for compensation is founded upon a law of Congress and is cognizable in the Court of Claims even though a subsequent appropriation statute allows a less amount for the fiscal year. The difference between the provision in the permanent act and the special appropriation may be recovered until the permanent act is expressly repealed.[13] So also where Congress appropriated a specific sum for a specific person, as where a definite amount was appropriated to be paid J. for taxes assessed "contrary to the provisions of a Treasury regulation," J. became absolutely entitled to the sum, which could not be withheld by an officer on the ground that as a matter of fact J's taxes had been legally collected. Congress having expressed its will, that must prevail, even though Congress acted under a mistake of fact. J's claim was founded on a law of Congress and recoverable in the Court of Claims.[14]

Contract, express or implied.—An implied contract on which recovery may be had, will arise where domestic vessels have been taken by the United States and used under the emergency conditions of war,[15] but the court will if possible find an express contract with the owner, and limit compensation to the amount agreed upon, especially if the owner

[13] U. S. v. Langston, 118 U. S. 389, 30 L. Ed. 164.
[14] Jordan v. U. S., 19 Ct. Cl. 108.
[15] U. S. v. Russel, 80 U. S. 623, 20 L. Ed. 474.

was left in charge, even though the vessel was lost in such service.[16] Even if a vessel is required to enter the service of the United States under threat of impressment, if after such entry the owner agrees on the amount of compensation he will accept, a voluntary express contract arises from that time, and no recovery in excess of the amount agreed upon will be allowed.[17] The Secretary of War may make a valid contract for the use of property, and when so made its breach will give rise to an action for unliquidated damages.[18] Should property be destroyed by a war vessel, however, this would not be a use from which a contract, express or implied, would arise.[19]

Where a complete and adequate remedy is provided by Congress through administrative appeal, the Court of Claims cannot take jurisdiction on the ground of an implied contract,[20] at least until the other remedy has been tried and exhausted.[21] The court accordingly was held to have no jurisdiction over claims arising from the revenue laws [22]; but the court would have jurisdiction over a suit by an informer to recover part of a penalty imposed for violation of the revenue laws [23] if such claim was instituted before the Secretary of the Treasury made final distribution of the fund.[24] In one case there was a remedy outside the court, in the other, none.

Where a law of Congress provided that the Commissioner of Internal Revenue should make regulations for refunds of excess collections, an allowance of a claim by the Commissioner raises an implied contract founded upon a law of Congress cognizable in the Court of Claims, especially if no

[16] Shaw v. U. S. 93 U. S. 235, 23 L. Ed. 880.
[17] Reed v. U. S., 11 Wall. 591, 20 L. Ed. 220.
[18] Dunbar v. U. S., 22 Ct. Cl. 109, semble, for held barred by limitations.
[19] Perriar v. U. S. 79 U. S. 315, 20 L. Ed. 412.
[20] Nicholl v. U. S., 7 Wall. 122, 19 L. Ed. 125.
[21] Medbury v. U. S. 173 U. S. 492, 43 L. Ed. 779.
[22] Nicholl v. U. S., supra; Turner v. U. S. 9 Ct. Cl. 367.
[23] Ramsay v. U. S. 14 Ct. Cl. 367.
[24] Kellogg v. U. S. 15 Ct. Cl. 372.

other remedy is provided.[25] The question of allowance by the Commissioner is to be strictly construed, and not lightly to be presumed. Reference to the Secretary for advice is not such a decision on a claim as will allow the court to take jurisdiction.[26] If the duty of an officer is, however, purely ministerial; if the law provides for the creation of a claim, leaving the officer no discretion as to allowance or disallowance, the court will have jurisdiction. For instance, Congress had provided for the allowance of drawbacks; an importer who had complied with all requirements could proceed directly in the court, even though the customs officers had refused him the certificates required by the Treasury department. His claim was founded upon a law of Congress, whereupon the facts raised an implied contract.[27]

Those who contract with the government must be careful to comply with all applicable statutory provisions governing the subject-matter, for they will be bound by the statute, and usually no implied contract can arise.[28] In some cases, it seems, statutory requirements may be ignored by the court and a contract implied. A contract required to be in writing was so made, but was not fulfilled within the time specified. Afterwards the goods were delivered to the government and accepted. Suit being for their value, the requirement of a written contract was pleaded. The court said that despite the statute a verbal extension of time, plus receipt and acceptance, formed a good contract; even if this were not so, the receipt and acceptance would raise an implied contract.[29]

To constitute an implied contract, "there must have been some consideration moving to the United States; or they

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[25] U. S. v. Kaufman, 96 U. S. 567, 24 L. Ed. 792; see also U. S. v. Real Estate Bank, 104 U. S. 728, 26 L. Ed. 908.

[26] U. S. v. Stotesbury, 146 U. S. 196, 36 L. Ed. 940.

[27] Campbell v. U. S., 107 U. S. 407, 27 L. Ed. 592. Such an implied contract does not come under the head of general "revenue" laws. Durant v. U. S. 28 Ct. Cl. 356. The principle of the Campbell case was applied in Swift v. U. S. 105 U. S. 691, 26 L. Ed. 1108—internal revenue.

[28] Bradley v. U. S. 98 U. S. 104, 25 L. Ed. 105.

[29] Salamon v. U. S., 19 Wall. 17, 22 L. Ed. 46.

must have received (the) money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake," [30] or, it seems, under duress.[31]

No contract will arise where the United States requires the performance of a service to which it is entitled. As it is the duty of every citizen to aid the Government by testimony before Congress where such information is to be used for the purpose of legislation, such a witness has no claim for witness fees, though in private suits a witness may sue in assumpsit for his fee.[32]

No Equitable Jurisdiction before 1887.—The exemption of the United States from suit extended as well to equitable controversies as to those at common law.[33] This was not altered by the original Court of Claims Act. Suit had been instituted to recover the value of lands claimed by the petitioner from money received by the United States from their sale, or to have land scrip issued instead. Virginia had ceded its western lands to the United States, reserving certain grants made to Continental soldiers, from one of which the petitioner traced title. A line had been run by the United States under which the land claimed was embraced in that portion ceded to the United States, but this line had never been acquiesced in by Virginia. The court held that this was not a contract founded on a law of Congress, but at the most a breach of trust by the United States, for which the Court of Claims was not the proper forum. "The Court of Claims had no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States." [34]

The Court Has No Tort Jurisdiction.—The Court of Claims has been (sometimes unduly) assiduous to prevent recovery on the basis of an implied contract in an action that

[30] Knote v. U. S. 95 U. S. 149, 24 L. Ed. 442, 444.
[31] Norton v. U. S. 97 U. S. 164, 24 L. Ed. 907.
[32] Lilley v. U. S. 14 Ct. Cl. 539.
[33] Hill v. U. S. 9 How. 386, 13 L. Ed. 185.
[34] Bonner v. U. S. 76 U. S. 156, 19 L. Ed. 666.

partakes of the nature of a tort. A contract had been made with the government for the sale to it of 200,000 bushels of oats. Part was delivered, and the rest tendered and refused. Later, after the expiration of the time stipulated, the market price rose sharply, and the quartermaster demanded the delivery of the remainder of the oats. Yielding to considerable pressure, the contractor made delivery. Payment was made at the contract price, and suit was then instituted for the difference between the contract and market price at the time of delivery. The court held that if the contractor voluntarily delivered the oats the second time, the old contract was in force and determined the rate; if he yielded only because of pressure, that was a tort on the part of the officer for which the officer alone was liable.

> But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.[35]

The leading case demonstrating the refusal of the court to take jurisdiction of actions of a tortious nature under the old Act, is that of Langford vs. the United States.[36] Indian agents acting for the United States took possession of buildings erected by the American Board of Foreign Missions, through whom Langford claimed, and retained possession by force and against the will of the Board and of Langford, under claim of title in the United States. Suit was brought to recover for the use and occupation of the lands and buildings on the basis of an implied contract. The court said:

> Conceding that the title, or even the right to possession of the premises was in the claimant, it would seem that the facts above stated show that the act of the United States in taking and holding that possession was a tort of the most unequivocal character, if the Government can be capable of a tort, and that if the case were one between individuals every implication of a contract is repelled.[37]

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[35] Gibbons v. U. S. 8 Wall. 269, 19 L. Ed. 453, 454.
[36] 101 U. S. 341, 25 L. Ed. 1010.
[37] 25 L. Ed. 1011.

The claimant's ingenious counsel contended that the government was incapable of committing a tort in taking and using the property of an individual by force and against his consent, for the maxim "the King can do no wrong" applies to the American government, therefore no tort can be committed by it; and since the Constitution provides that private property shall not be taken for public use without just compensation, in all cases where such property is taken for a public use, there arises an implied obligation to pay for it. The maxim, usually applied to shield the state acting through its government, was here sought to be used against it, and was promptly repudiated by the Supreme Court, which held the doctrine did not apply in the United States where there was no King. The court admitted that where the United States acknowledges title to be in a private individual there arises an implied obligation to pay, but where the United States claims title in itself, the court cannot decide that in fact the property belongs to another. If in fact the property does belong to a citizen, then the officers claiming title in the United States are guilty of a tort, but no implied contract results.

The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal right of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that Court. This policy is founded in wisdom, and clearly expressed in the Act defining the jurisdiction of the court, and it would ill become us to fritter away the distinction between actions ex delicto and actions ex contractu, as well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.[38]

If, however, the United States in any way recognizes the title of the individual he can recover on an implied contract.

[38] 25 L. Ed. 1012.

Congress by an appropriation had authorized the construction of a dam across the Potomac to supply Washington with drinking water. In the construction of this dam, lands of the plaintiff were taken, though such lands were not ordered to be taken by the Act. Suit was brought for their value on the basis of an implied contract. The court considered that the authorization to construct the dam was an order to appropriate the lands needed.

> The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions "founded upon any contract, express or implied, with the government of the United States." [39]

The old act gave the Court of Claims no equitable jurisdiction, and none over torts, nor could the tort be waived and an action ex contractu be instituted, even though based on a specific constitutional provision. Apparently to cure at least some of these defects, Congress broadened the jurisdiction of the Court in 1887, making the paragraph heretofore construed, to read as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters: First. *All claims* (*except for pensions*) founded *upon the Constitution of the United States* or any law of Congress, upon any regulation of an Executive Department, upon any contract, expressed or implied, with the Government of the United States, *or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable:* Provided, however, that nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war Claims" or to hear and determine other claims which, prior to March third, 1887, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.[40]

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[39] U. S. v. Great Falls Manufacturing Co., 112 U. S. 645, 28 L. Ed. 846. So the use of a patent with the consent of the patentee was held to raise an implied contract. U. S. v. Palmer, 128 U. S. 262, 32 L. Ed. 442.

[40] March 3, 1887, 24 Stat. L. 505, Judicial Code 145, Compiled

It would seem that the new Act would cover every possible claim of the individual against the United States, except in the case of damages from torts that were not based on the Constitution, a law of Congress, or a regulation of the Executive department, for the tort limitation is by logical and grammatical construction and punctuation apparently confined to the last clause. That is, in view of the evils intended to be corrected, and the wording of this remedial statute, the court would have jurisdiction of torts if founded upon the Constitution, a law of Congress, or regulations of the Executive department, or if growing out of a contract with the Government. The court was given broad Equity and Admiralty jurisdiction. As it had been previously decided that where an officer claimed title in the Government, which was disputed by the claimant, the latter could institute an action in ejectment against such officer and on proving his (the claimant's) title, recover possession,[41] it at first appeared that after the passage of the amended Act a resident of the United States was as completely protected in his property rights against any action on the part of the Government or its agents as he was against that of a private individual. But "things are not as they seem," and the judicial interpretation of the Act narrowed extremely its effectiveness.

A case involving the equitable jurisdiction of the Court of Claims arose the year following the passage of the amendatory act. A bill for specific performance was filed, asking that the government be compelled to deliver patents for land purchased under an Act of Congress. Performance of conditions by the petitioner and payment of the purchase price were alleged. The decision of the court must have been rendered by a justice who had never read the Act of 1887, otherwise there is no way to explain the omission of some of its vital provisions from the quotation of the act on which Justice Bradley sustained a demurrer to the bill. "The

Statutes (West Pub. Co., 1918) 1136 (1). The italicized portions represent the important additions made by the Act.

[41] U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 172. (1882).

jurisdiction," he said, "here given the Court of Claims (1887) is precisely the same as that given in the Acts of 1855 and 1863 with the addition that it is extended to 'damages . . . in cases not sounding in tort' and to claims for which redress may be had 'either in a court of law, equity or admiralty.'" [42]

Now together with the addition to the jurisdiction cited by the learned justice, there should have been added the words "founded upon the Constitution"—which however did not apply here; and the class of claims for which redress was given should have read "either in a court of law, equity, or admiralty *if the United States were suable*"; in other words, the clear intent of the Act was to provide in non-tortious claims in law, equity or admiralty the same remedies that would be applied in suits between private parties. Failing to notice these essential words, and relying on the fact that a money requirement was provided for all appeals, and specific provisions for money payments were made, the court held that no jurisdiction had been given the Court of Claims to decree specific performance.[43]

Apparently two of the judges had read the act. No stronger nor more accurate criticism of the majority opinion is possible than that voiced by Justice Miller, and concurred in by Justice Field:

> This act was evidently intended to confer a new and important jurisdiction upon the Court of Claims. . . . I can see no other possible object in that part of the statute which for the first time in the history of that court authorizes it to take cognizance of claims where the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, than to make them suable in such cases. To hold that the distinct grant of power here provided for is controlled by the fact that this court has under former statutes decided that it did not then exist, is simply to nullify this new grant of power.[44]

Neither has the court jurisdiction in equity to remove a

[42] U. S. v. Jones, 131 U. S. 1, 33 L. Ed. 90.

[43] Ibid, 33 L. Ed. 92. Would not the money value in a case for specific performance be the value of the thing whose conveyance was sought?

[44] 33 L. Ed. 92.

cloud on a title by setting aside a judgment lien erroneously filed by the Government. A judgment had been obtained by the United States against a surety and a judgment lien filed against real estate in which this surety had no interest except as tenant by courtesy. A petition was filed by the owners, mortgagor and mortgagee to set aside the lien. The petition was dismissed on the ground that it was not a claim for damages, or if it was, the imposition of a void lien was a tort, for which the officer filing it was alone responsible.[45]

The court has jurisdiction, however, to reform a contract and at the same time award damages for a breach thereof.[46] Where an agreement had been made with the intention of settling all disputes, but when reduced to writing contained the phrase "without prejudice to either party" which was directly contrary to the meaning and intent of both parties, the mutual mistake was rectified.[47] Mistakes of law are usually not good ground for reformation, but where such a mistake of law occurs not in the making of the agreement, but in its reduction to writing, the court has jurisdiction.[48]

The ordinary principles of equity jurisprudence are applied by the court. It has no jurisdiction to reform a contract in the absence of mutual mistake,[49] nor to incorporate antecedent correspondence into a contract, where the contract as made was carefully considered before it was signed.[50]

The apparent purpose of the grant of jurisdiction to the Court of Claims over claims founded upon the Constitution was to correct just such cases as the Langford decision,[51] and to give compensation whenever, for instance, land belonging to a resident of the United States was taken by the United States or its officers for a public use, even under a

[45] U. S. v. Holmes, 78 Fed. 513.

[46] U. S. v. Mullikin Imprinting Co., 202 U. S. 168, 50 L. Ed. 980, aff. in Cramp v. U. S., 239 U. S. 221, 60 L. Ed. 238. The latter case also decided that findings of fact in the Court of Claims will not be reviewed by the Supreme Court, even in Equity cases.

[47] Aetna Construction Co. v. U. S. 46 Ct. Cl. 113, 127.

[48] Ibid., 130, 131.

[49] Sanger v. U. S. 40 Ct. Cl. 47.

[50] South Boston Iron Works v. U. S., 34 Ct. Cl. 174, 200.

[51] Ante, p. 78.

claim of title in the Government, if such claim of title was in fact false.[52] Such was not the interpretation of the Supreme Court.

A lighthouse had been built on submerged land owned by the plaintiff, without condemnation or compensation. A claim was filed by the owner, but was dismissed by the court on the ground that "the case at bar is governed by Langford's case."[53] Now as the decision of the Langford case was based, in answer to the assertion of the plaintiff that his claim was founded on the Constitution, on the ground that Congress had not given the court jurisdiction of such claims, to hold that after Congress had amended the Act by words expressly including such claims the court was bound by its own decision delivered before the amendment, was practically to nullify the will of Congress and substitute that of the court. If ever the doctrine of stare decisis was misapplied, this is an instance.[54]

This ruling was applied two years later in a suit for infringement of a patent by the United States. The claim was refused, the court holding that though a claim founded on the Constitution, it was tortious in character, and the court was without jurisdiction. The words "not sounding in tort" were thus made to apply to all classes of cases over which jurisdiction was granted. The opinion was 'supported' by citing cases decided before 1887. A vigorous dissent followed, which as an interpretation of the statute according to its apparent significance again seems preferable to the majority opinion.

The Act of March 3, 1887, for the first time gives the Court of Claims jurisdiction to hear and determine "all claims founded upon the Constitution of the United States." . . . It is none the less a claim of that character, even if the appropriation had its origin in tort. The constitutional obligation cannot be evaded by show-

[52] Stovall v. U. S., 26 Ct. Cl. 226.

[53] Hill v. U. S., 149 U. S. 594, 37 L. Ed. 862.

[54] J. Shiras dissenting considered the 5th Amendment allowed expropriation but raised a contract to pay. He noted that the Act of 1887 was apparently a recall of the Langford case. 149 U. S. 600, 602.

ing that the original appropriation was without the express direction of the government; nor by simply interposing a denial of the title of the claimant to the property or property rights alleged to have been appropriated. . . . If the claim here made to be compensated for the use of a patented invention, is not founded upon the Constitution of the United States, it would be difficult to imagine one that would be of that character.[55]

It seemed for a while as if the dissent in the Hill and Schillinger cases would bear fruit. After the Spanish-American War, suit was brought to recover customs duties collected on goods imported into Porto Rico from the United States. It was found that such import duties were improperly levied, and recovery was allowed.[56] It was strongly urged by the government that the illegal exaction of the duties was a tortious act, for which the government was not liable. By strict application of the "rule of law" this argument was sound. There being no law allowing the collection of duties, their collection was illegal, a tort; the customs collector was liable, the United States not. But the court, construing the Act of 1887, found authorization to adjudicate the claim, though tortious.

But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker Act, of claims founded upon a law of Congress, namely, a revenue law. . . .[57]

Several years later this doctrine was reinforced by a concurring opinion of three of the majority justices. Officers

[55] Schillinger v. U. S., 155 U. S. 163, 39 L. Ed. 108. The whole question of government use of patents was exhaustively discussed by Ch. J. White in the case of Wm. Cramp & Sons v. The International Curtis Turbine Marine Co., 246 U. S. 28, 62 L. Ed. 560. The Act of 1910, 36 Stat. L. 851, below p. 94, authorizes suits against the United States for infringement of patents. The case cited held that the Act did not allow a government contractor to infringe and escape personal liability; it applied only to government officials acting on behalf of the government.

[56] Dooley v. U. S. 182 U. S. 222, 45 L. Ed. 1075. It followed De Lima v. Bidwell, 182 U. S. 1, 45 L. Ed. 1041, in holding that Porto Rico was not a foreign country, and the revenue law was inapplicable.

[57] Dooley v. U. S., 182 U. S. 222, 45 L. Ed. 1075, 1080.

of the United States, for the improvement and aid of navigation, had built a dam across the Savannah. The water was backed up and flooded the lands of the plaintiff permanently, resulting in a permanent ouster. The government neither affirmed nor denied the title of the plaintiffs, but relied on the defense that no contract had arisen. The first opinion of the court decided for the plaintiffs on the ground that where property is taken by the United States and the owner's title is not denied, an implied contract arises. Three justices joined in a concurring opinion,[58] denying that any contract could be implied, but asserting that a claim founded upon the Constitution arose whenever private property was taken for public use; that the word "tort" in the act of 1887 related to the last class of claims there enumerated.[59]

Some change in the constitution of the membership of the court occurred before the next case arose on this point, when the pendulum took a decided swing back toward Schillinger and Langford. Statutes provided that no contract in excess of appropriations should be made. A house was rented to the government, excluding the basement, which however was occupied and used by the government. Receipts for the rent were given for five years, all of which read for rent in full except the basement. Suit was then brought for the rental value of the basement during the five year period. Recovery was refused. There was no contract express or implied; nor would the court allow the claim to be based on the Constitution, as a taking of property; for the occupation of the premises without authorization of the owner would be a claim "having its origin in a *violation* of the Constitution."[60] It would seem that a violation of a constitutional provision would be the natural means of creating a claim founded

[58] Five held the claim good on the ground that an implied contract was created; two of these felt jurisdiction also could be maintained on the general grant of jurisdiction over claims founded on the Constitution even though tortious in character; a sixth justice made this the sole basis for his acquiescence in the result; three dissented.

[59] U. S. v. Lynah, 188 U. S. 445, 47 L. Ed. 539.

[60] Hooe v. U. S. 218 U. S. 332, 54 L. Ed. 1055.

upon it, at least as regards the 5th Amendment, for if private property is taken for a public use with compensation, there is no basis for a further claim; it is only when it is taken "without compensation" that a claim would seem to arise.

It thus appears that at the present time jurisdiction over claims founded on the Constitution will be refused, if tortious. A Spanish subject residing in Porto Rico was imprisoned for importing goods from the United States without a customs declaration. He pleaded the interpretation of the Supreme Court in the Dooley case [61] justified his action; despite this he was imprisoned, and then brought suit for false imprisonment. He pleaded that his case fell within the ruling in the Dooley and Lynah cases; admitted that it was founded on a tort, but claimed it was one arising under the Constitution. He said his claim was invalid if the Schillinger case was still law. The case seems to have been decided on this point, the court holding the Dooley, Lynah and Schillinger cases were all in force; that this case fell under the Schillinger ruling, and by the admission of the plaintiff was thus bad.[62] Apparently, then, the total effect of the addition of the words "founded upon the Constitution" in the Act of 1887 has, as applied to tort cases, been limited to one application and one concurring opinion; at the present time the "constitutional" provision cannot be invoked to recover for a wrongful act.[63]

A private vessel in charge of a Lieutenant of the United States Navy was injured in a collision sustained through obedience to the orders of such lieutenant, given over the protest of the captain, who was employed by the owners. This placed no liability on the United States, even though the orders of the lieutenant, the cause of the collision, had to be obeyed.[64]

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[61] Ante, p. 85.

[62] Basso v. U. S. 239 U. S. 602, 60 L. Ed. 462. The Dooley case was treated as if it were merely a case of implied contract.

[63] See U. S. v. Nederlandisch-Amerikanische A. M., 254 U. S. 148, 65 L. Ed. 193.

[64] New Orleans-Belize &c. S. S. Co. v. U. S., 239 U. S. 227, 60 L. Ed. 227.

If land is taken by the government, a denial of title in the owner by the officer in charge deprives the court of jurisdiction. The denial of private title precludes a contract; the action if unjustified is a tort, which, though founded on the Constitution, will not be cognizable by the court.[65]

When the Port of Ponce was occupied by the United States a certain merchant vessel was captured. The government later offered to abandon it if claims for damages were waived, thus seemingly acknowledging the claimant's title. The vessel was abandoned, and suit was instituted for its value. The court said the action was tortious; that no title had been recognized in the claimant, and so no contract could be implied.[66]

Nor can the tort be waived, and suit brought in assumpsit to give the court jurisdiction, as is often the case in actions at common law. Certain government vessels were stranded and left, despite notice to the government. These ships caused a deflection of the currents, resulting in a washing of the shore of the plaintiff to his great damage. The court held that the failure of an actual physical entry on the land prevented the question of its appropriation being raised; that the real case was one for consequential damages from negligence, over which the court had no jurisdiction.[67]

No matter how skilfully the petition may be drawn so as to exclude the element of tort, the court will be zealous to prevent what amounts to a waiver of tort. The claimant was present in a federal court house at the request and for the benefit of the United States. He was there injured by the negligent operation of an elevator by a government employee, and brought suit on the ground that, being present at the request of officers of the United States, his entry into the elevator raised an implied contract on the part of the govern-

[65] Tempel v. U. S. 248 U. S. 121, 63 L. Ed. 162.

[66] J. Ribas y Hijo v. U. S., 124 U. S. 315, 48 L. Ed. 994. Some question may be raised whether the true basis for the decision should not have been the effect of the treaty with Spain on such claims. Juragua Iron Co. v. U. S., 212 U. S. 297, 53 L. Ed. 522 is a similar case of military destruction of property in Cuba.

[67] MacArthur v. U. S. 29 Ct. Cl. 191.

ment that he would be carried safely. But the court replied that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." [68]

The interpretation of "contracts express or implied," has been practically the same before and after the Act of 1887. The United States had agreed to return certain railroads taken over during the Civil War, together "with all material." Actually some was sold; an action would lie for this amount.[69] Where a contractor agreed to build a bulkhead, and was required to keep the old government construction intact, he was entitled to recover the extra expense occasioned by the insufficiency of the government structure for the work it was supposed to do.[70] A contractor relying on specifications of materials used in an old government dam was entitled to recover the extra expense incurred from the presence of different substances [71]; any positive assertion by the government is a representation on which the contractor may rely without investigation.[72]

Land taken by the government for public use without claim of title by the United States allows an action for compensation. Such a taking is any act that destroys the ordinary use and value of the land, even though there be no physical possession by the government; for instance, the flooding of land by the erection of a dam. Such injury is not merely inconsequential.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall

[68] Bigby v. U. S. 188 U. S. 400, 47 L. Ed. 519.
[69] Winchester &c. R. R. v. U. S. 27 Ct. Cl. 494.
[70] Day v. U. S., 245 U. S. 159, 62 L. Ed. 219.
[71] Hollerbach v. U. S., 233 U. S. 165, 58 L. Ed. 898.
[72] U. S. v. Utah, 199 U. S. 414, 50 L. Ed. 252.

be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy the value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[73]

So the owner of the reversion had an action against the United States for loss caused by such use of his lands as destroyed their value as farm lands, and this was true even though his tenant had already recovered against the government for the rent he had lost.[74] The erection of guns trained to fire over land used for a summer resort and actually fired several times, the intention being manifested to continue such actions, constituted a taking.[75] The destruction of an easement (private way) was as much a taking as an appropriation of the property subject to it.[76]

Taking of property under claim of title in the United States, or the infringement of patents are torts and no action arises.[77] But the use of property where the owner's title is recognized, does, as we have seen, create an implied contract; so does the use of a patent with the owner's consent give rise to a claim for royalties.[78]

A contractor was led to do work in excess of the appropriation by the negligent accounting of the government inspector. No contract could be implied, for the government officer could not have made an express one. Here the use of the work done did not amount to a ratification, for the construction was of a permanent nature. The government however

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[73] Pumpelly v. Green Bay, 13 Wall. 166, 20 L. Ed. 557.
[74] Alexander v. U. S., 39 Ct. Cl. 383.
[75] Portsmouth L. & H. Co. v. U. S., 260 U. S. 327, 67 L. Ed. 287.
[76] U. S. v. Welch, 217 U. S. 333, 54 L. Ed. 787.
[77] Changed as to patents by Act of 1910.
[78] Harvey Steel Co. v. U. S. 38 Ct. Cl. 662, aff. 196 U. S. 310, 49 L. Ed. 492. See also Farnham v. U. S. 49 Ct. Cl. 19.

was not entitled to charge for the services of the negligent inspector.[79]

Where an extra charge on public lands was paid without protest, the purchaser was not entitled to recover the excess,[80] not was a consul who had paid without protest fees for which he was not chargeable [81]; but when a series of payments had been made under a regulation, and one protest was made on the first payment, this was sufficient to cover all similar payments.[82]

The jurisdiction given the Court of Claims over claims for which the United States would be liable if suable in an admiralty court has resulted in the court taking cognizance of some claims that would otherwise have been refused; though it seems that ordinarily claims, as for instance salvage, would have been recoverable on the basis of a contract express or implied.[83] In at least one quite interesting case it was held that the admiralty grant had enlarged the jurisdiction of the court. Sugar had been saved from a fire in New York harbor before delivery to the consignees, but after duty had been paid on it. The salvors were allowed compensation at 10% of the value of the property and also of the duties saved to the United States on the ground that the United States was directly interested in the salvage services, for if the goods had been lost, the duty paid would have been refunded. Said the court:

> . . . where the services are rendered, as in this case, without request of an officer of the government, and particularly where they are incidental to services rendered in the saving of private property, we do not think the claim can be said to arise upon any contract, express or implied, with the government of the United States. But the claim may properly be one for unliquidated damages in a case 'not sounding in tort' in respect of which the party would be entitled to redress in a court of admiralty, if the United States were suable.[84]

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[79] Smith v. U. S. 256 U. S. 575, 65 L. Ed. 1099.
[80] U. S. v. Edmonston, 181 U. S. 500, 45 L. Ed. 971.
[81] U. S. v. Wilson, 168 U. S. 273, 42 L. Ed. 464.
[82] Swift v. U. S. 111 U. S. 22, 28 L. Ed. 341.
[83] Hartford Tranportation Co. v. U. S. 138 Fed. 618; McGowan v. U. S., 20 Ct. Cl. 147.
[84] U. S. v. Cornell Steamboat Co., 202 U. S. 184, 190, 50 L. Ed. 987.

The master and crew are entitled to salvage even though both salvor and salved belong to the government and are used exclusively for governmental purposes.[85]

The Act of 1887, to summarize, though broad in its terms and apparently in its intention also, has given the Court of claims additional jurisdiction over a few admiralty claims, one founded on the Constitution, and those in equity seeking reformation of contracts. Apparently Acts of Congress form but one very feeble source of law.[86]

In addition to the general grant of jurisdiction above discussed, which from the viewpoint of the private citizen is the most important, the Court of Claims has other jurisdiction as well. In every case where a claim is presented, the claimant subjects himself to any claim of whatever character the government may have against him; set-off, counterclaim, or claims for damages liquidated or unliquidated.[87] Affirmative judgment on these claims may be rendered for the United States for any excess over the amount proved by the claimant.[88] The court acts without a jury; this applies as well to proceedings by the government on set-off and counterclaim as on the original petition. The claimant may thus have a judgment rendered against him without a jury trial, but this is not violative of the 7th Amendment, for such proceedings are not suits at common law within the meaning of the constitutional provision. As the government cannot be sued without its consent, it may impose such conditions on the granting of that consent as it chooses. Here the claimant knows that if he files a claim he may be met by another claim on the part of the government on which judgment may be entered without a jury trial; if he uses the privilege granted of suing an otherwise immune government, he does it subject to the conditions annexed.[89] An assignee

[85] Jacobsen v. Panama Rwy., 266 Fed. 344.
[86] Cf. Gray, Nature and Sources of Law, s. 191.
[87] Judicial Code 146, Compiled Statutes (West. Pub. Co. 1918), 1136 (2).
[88] J. C. 146, Comp. St. 1137, Rev. St. 1061.
[89] McElrath v. U. S. 102 U. S. 426, 26 L. Ed. 189.

of a contract, however, is not subject to an affirmative judgment on a claim available against his assignor; such claim may be used only as a set-off.[90]

Congress may refer any claim pending before it to the Court of Claims for the "investigation and determination of facts." The court then proceeds according to its own rules, and reports to the House. If any such claims are within the general jurisdiction of the Court, it proceeds to judgment and decree after a hearing, and reports its decision to the House.[91] These references by Congress have greatly cluttered up the court dockets. The court files the claim; evidence, which is by deposition, awaits the agreement of the parties. After all the evidence is in, the parties (Government and claimant) brief the case and present it to the court. The court has no way to dispose of these referred cases except on a motion by the government to dismiss for lack of prosecution, which will not be entertained for two years after a claim is referred, and which will be refused even then, if any progress in the development of the case has been shown. Even where a dismissal occurs, most of such claims are again referred by a subsequent Congress.[92]

Controverted questions of law and fact pending in any executive department may be sent to the court for a report. Here again if the claim is one within the general jurisdiction of the court, or if the transmission was with the consent of the claimant, the court may render judgment or decree.[93] It is still possible for the court to act in its old capacity as an auditing board; where claims are referred to the court by special act, of which the court would not have had cognizance but for that act, no appeal lies to the Supreme Court.[94]

A person may be indebted to the government and acknowledge his indebtedness, but he may not be sure as to the

[90] Dickerson v. U. S. 31 Ct. Cl. 399.
[91] J. C. 151, Comp. St. 1142.
[92] Appendix to Chase v. U. S., 55 Ct. Cl., 293.
[93] J. C. 148, Rev. St. 1063, Comp. St. 1139.
[94] Ex parte Atocha, 84 U. S. 439, 21 L. Ed. 696.

amount. If he has applied to the proper department for an accounting, and this has not been rendered within three years after requested, the court on notice to the Attorney-General may hear the debtor, and give judgment against him for the amount due. If the United States does not sue on this judgment within three years it is barred from any subsequent action on the original indebtedness.[95]

Apparently to recall the Schillinger case, jurisdiction is given the court to allow reasonable compensation to a patentee whose patent has been used by the United States without his consent, provided such patent had not previously been owned, leased, used by or in the possession of the United States, and that neither the patentee nor his assignee are employees of the government when such claim is made, and provided further that such patent was not invented by a patentee while a government employee.[96] Any one to whom a patent was refused because its publication might be dangerous to the prosecution of the war, is entitled to compensation for such delay if after the war the patent is in fact issued.[97]

The Court of Claims is authorized to consider the claim of any disbursing officer of the United States for relief from responsibility on account of loss of government funds, vouchers, papers or records entrusted to him, occurring while he is engaged in the line of his duty.[98] Where such loss is found to have been without fault or negligence on the part of the officer, a decree is entered for the amount, which is allowed the officer by the accounting officers of the Treasury in the settlement of his accounts.[99] Under this section disbursing officers have been relieved from losses arising from highway robbery,[100] theft,[101] capture by the enemy,[102] and

[95] J. C. 180, Comp. St. 1171.
[96] June 25, 1910, 36 Stat. L. 851, Comp. St. 9465.
[97] 40 Stat. L. 394, Comp. St. 9429 a. For the law relating to patents before and after the Act of 1910, see Wm. Cramp & Sons Shipbuilding Co. v. International Curtis Marine Turbine Co., 246 U. S. 28, 62 L. Ed. 560.
[98] J. C. 145, R. S. 1059, Comp. St. 1136 (3).
[99] J. C. 147, R. S. 1062, Comp. St. 1138.
[100] Wood v. U. S., 25 Ct. Cl. 98.
[101] Glenn v. U. S., 4 Ct. Cl. 501.
[102] Murphy v. U. S., 3 Ct. Cl. 212.

fire.[103] Forgery by a clerk cannot be pleaded by the superior under this provision, at least when he would have a right of action against the depository on which the forged instrument was drawn.[104]

In claims by disbursing officers the ordinary rules of negligence are applied; the officer is expected to use only that degree of care in the custody of government property that an ordinarily prudent man would use under like apparent circumstances. If the necessary care has been used, the court will relieve against a loss incurred.[105] If money has been stolen even after the exercise of due care, the officer will be allowed the loss and the sum spent by him for capture of the culprits, and rewards.[106] As the court said:

> To require that disbursing officers shall be gifted with prescience, or endowed with power to use superhuman efforts, so as always to avoid or prevent losses, would be to exact from mortals the exalted excellencies of superior beings. From the latter class, disbursing officers are rarely, if ever, appointed.[107]

The Court of Claims has no jurisdiction if the claimant at that time has pending in any other court a suit against a person who at the time of the accrual of the action, was, in respect thereto, acting or professing to act under authority of the United States.[108] The claimant must choose his remedy, selecting either that against the officer, or the United States. Nor has the court jurisdiction over pensions[109]; nor over claims against the government growing out of treaty stipulations with foreign nations or the Indian tribes.[110] But when Congress has established a court of commissioners to distribute moneys received under a treaty, suit can be brought on an unsatisfied judgment awarded by the

[103] Hoyle v. U. S., 21 Ct. Cl. 300.
[104] Hall v. U. S., 9 Ct. Cl. 270.
[105] Malone's Case, 5 Ct. Cl. 486.
[106] Glenn v. U. S., 4 Ct. Cl. 501.
[107] Ibid., 506-507.
[108] J. C. 154, Comp. St. 1145.
[109] J. C. 145, Comp. St. 1136 (1).
[110] J. C. 153, Comp. St. 1144.

commissioners. The suit is really based on the Act of Congress, not the treaty.[111]

If the court would otherwise have jurisdiction of the subject-matter, it may entertain suits by aliens if their government allows citizens of the United States to prosecute claims against it in its courts.[112] A petition of right is a close enough approximation to a permission to sue the government, to enable English subjects to sue in the Court of Claims.[113] An examination of the cases dealing with this point shows that in most European countries the State and Government are much more frequently amenable to suit than is true in the United States.

> In the great arrogance of great ignorance, our popular orators and writers have impressed upon the public mind the belief that in this republic of ours private rights receive unequalled protection from the government; and some have actually pointed to the establishment of this court as a sublime spectacle to be seen nowhere else on earth. . . . [The section allowing suits by aliens] has revealed the fact that the legal redress given to a citizen of the United States against the United States is less than he can have against almost any government in Christendom. The laws of other nations have been produced and proved in this court, and the mortifying fact is judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to law.[114]

Besides England, the following countries have, by cases before the court, been shown to allow suits by foreigners against their governments, thus entitling their citizens to sue in the Court of Claims on a parity with American citizens: Spain, where the right of suit is a common law one ;[115] Italy, where the liability of the government is "not a device of modern civilization, but has been deemed inherent in the system;"[116] France,[117] Belgium, where suits are allowed, not

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[111] U. S. v. Weld, 127 U. S. 51, 32 L. Ed. 62.
[112] J. C. 155, Comp. St. 1146.
[113] U. S. v. O'Keefe, 78 U. S. 178, 20 L. Ed. 131.
[114] Brown v. U. S., 6 Ct. Cl. 171, 192.
[115] Molina v. U. S., 6 Ct. Cl. 269.
[116] Fichera v. U. S., 9 Ct. Cl. 254, 256.
[117] Dauphin v. U. S., 6 Ct. Cl. 221.

as a result of statute, but on general principles of law;[118] Switzerland;[119] Holland;[120] and Prussia.[121]

The bars of sovereign immunity have thus been relaxed considerably in the field of contracts, with, however, numerous safeguards retained to protect the government. Some little has been accomplished in the field of Equity, and perhaps in admiralty as well; in tort, the old doctrine of immunity prevails. There has been no particular run on the Treasury, nor has there been any particular evidence of indignity suffered by the State descending from its pedestal. If the words "not sounding in tort" were removed from the grant of jurisdiction to the Court of Claims, and if the Supreme Court would recognize their removal, it would seem that the rights of citizens would be well protected, officers could perform their duties with less danger of being prosecuted for not having the qualifications of jurisconsults, and whatever might be the protests of logical inconsistency by abstract legal theorists, they would be more than offset by concrete justice.[122]

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[118] De Give v. U. S., 7 Ct. Cl. 517.
[119] Lobsiger v. U. S., 5 Ct. Cl. 687.
[120] Brown v. U. S., 6 Ct. Cl. 171.
[121] Brown v. U. S., 5 Ct. Cl. 571.
[122] War claims, questions of procedure, jurisdiction of the District Courts concurrent with or similar to that of the Court of Claims, and the jurisdiction and functions of the Court of Customs Appeals, Board of Tax Appeals, and provisions relating to Departmental Adjustment of Claims, as well as miscellaneous statutory provisions, though treated in the manuscript filed with the Board of University Studies of The Johns Hopkins University, have been omitted from this edition.

CHAPTER VIII

Suits Against Officers: The United States

The property of a State may not be proceeded against directly by an individual having a claim against the State. This would, however, be of negligible importance if such property could be reached indirectly, under the guise of a suit against the officers of the state in possession of its property. In the United States, the earlier cases proceeded on the ground that a state was not a party to a cause unless its name appeared on the docket; that a suit, even though resulting in a judgment involving the interests or property of the State, was not against it if in name the case was between a citizen and officers of the State. Now as officers are the only media through which the State can voice its will, or act, it is apparent that if suits are freely allowed against officers, controlling their action, it is mere logomachy to insist that the State is immune from suit. The courts, where state property is involved, have, however, frequently sought to do justice rather than to conform to abstract propositions of law; the resulting confusion of cases, and the impossibility of drawing any precise conclusions or framing any hard and fast rules while undesirable as introducing that uncertainty which is called the antithesis of law, appear to the writer, at least, as encouraging evidence of the wholesome struggle of justice in the concrete against theory in the abstract.

A vessel had been condemned by a state prize court, in spite of an injunction from a superior court of the Confederation, a court whose powers vested in the District Courts after the Constitution. Under the decree of this state court, the proceeds were transmitted to the Treasurer of the state, who, however, did not cover them into the Treasury. Under proceedings in the United States District Court the proceeds were awarded to other parties, and, on appeal to the Supreme Court, execution against the state Treasurer was ordered. The state insisted title as well as actual possession of these

funds was in the state; the Supreme Court felt that a mere suggestion of title by a state was not sufficient; that the court could examine the validity of such title, and finding none, could allow the rightful claimants to pursue the property "into whosesoever hands it might come." The suit was construed to be one against an individual, not the state, even though that individual was the Treasurer of the State, and although the state claimed (what on investigation proved a bad) title.[1]

The United States had established a garrison on certain land, and improved it to the value of $30,000. Suit in ejectment was brought against the officers in charge, who pleaded that they held the land "occupied by the United States troops and the defendants as officers of the United States, for the benefit of the United States, and by their direction," though this point was not strongly pressed. The court ruled that if title in fact were in the plaintiff, he might sustain his action, for "the United States could not be presumed to have intended to deprive the individual of" his land without compensation.[2]

Probably the most famous early example of the proposition that for a suit to be against a state, it must be against it in name, is the case of Osborn v. U. S. Bank.[3] The state of Ohio had levied a tax on a branch of the Bank of the United States situated in that state. The Bank refused to pay, and Osborn, State Auditor, in contempt of an injunction issued by the United States Circuit Court on the prayer of the Bank, had seized $100,000 of the Bank's funds, and paid the same to the state Treasurer. Suit by the Bank was instituted against Osborn and the Treasurer for restitution of the fund; it was urged throughout the case that the state of Ohio was the real party in interest, and that the officers were sued as such, for their acts done in their official character, in obedience to state law. The court held that inability to make the state

[1] U. S. v. Peters, 5 Cr. 115, 139, 3 L. Ed. 53.
[2] Meigs v. McClung, 9 Cr. 11, 3 L. Ed. 64.
[3] 9 Wh. 738, 6 L. Ed. 204.

a party without defeating the suit was a good reason for not making it a party; and that "making a state officer a party does not make the state a party, although her law may have prompted his actions, and the state may stand behind him as the real party in interest." [4]

About sixty years later an even more famous case involving the property of a state was decided. An action in ejectment was commenced against certain officers of the United States to recover property held by them for a national cemetery. The defendant pleaded a tax sale to the government, which sale in fact was illegal. The United States intervened for the sole purpose of objecting to the jurisdiction, and alleged that title was in it. The question was thus raised as to the ability to sue the officers of the United States, where the judgment depended upon the right of the United States to property held by such officers for the government, without any personal interest or claim. The court faced an extremely difficult problem; if it allowed the suggestion of title or objection to jurisdiction offered by the United States to prevail, no citizen was secure in his property or effects [5]; if it allowed the suit, the result was to oust the United States. The court, five to four, took an eminently practical and just, but logically indefensible view, and allowed the suit. It was careful to point out that this did not conclude the United States; that suit by the United States in ejectment, or to remove a cloud from the title could be instituted—but this does not alter the real effect.[6]

What was decided in the Lee case was that officers, relying on a claim of title by the United States, and holding only

[4] Cited in Davis v. Gray, 16 Wall. 204, 21 L. Ed. 452. The value of this case as a precedent for a proceeding against property in the hands of the state (officers) was questioned by the dissent in U. S. v. Lee, 27 L. Ed. 190, on the ground that the money was kept apart as a separate fund. Even if this were so, the separate fund was held in the only way a state can hold, and was held for the state, without any private claim by the officers.

[5] A striking statement of this danger is given in Wells v. Nickles, 104 U. S. 44, 26 L. Ed. 825, 826, by Justice Miller, who delivered the majority opinion in U. S. v. Lee.

[6] U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 172.

for the United States and for its public purposes, could not prevail if in fact the United States did not have good title. Now the United States can hold property only through officers; if they are ejected because of faulty title in the government, so is the United States to all intents and purposes. Granted that after such ejectment the United States can in its turn take proceedings; here the United States would come as a plaintiff and subject to the ordinary rule of law that it must recover, if at all, on the strength of its own title, not the weakness of the defendant; or in Equity to the maxims of 'clean hands' and 'he that seeks equity must do equity.' In other words, if officers of the United States can be ejected for the defective title of the United States, then the United States is as effectively dispossessed as if the suit had been against it in name, as well as in fact, and the United States is deprived of the sovereign attribute of immunity, and relegated to the subordinate position of an ordinary suitor who must rely on ordinary defenses or grounds of complaint.

In another possessory action the same results were reached. Action was brought against the Secretary of State, who claimed no personal interest; the court again emphasized the fact that the only point settled was between plaintiff and defendant as to the right of possession, leaving the State free to take appropriate action, but in an unanimous opinion said:

> The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf. . . . Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent.[7]

The court distinguishes, however, between possessory actions, and actions in the nature of ejectment, but which actually try title. The latter are held to be against the state, for the decision is conclusive, and prevents later affirmative

[7] Tindal v. Wesley, 167 U. S. 205, 42 L. Ed. 137.

action. The case of Stanley v. Schwalby is directly in point. This also was an action brought in name against the officers in charge of a military reservation, which, though seeking immediate possession from them, also, according to the laws of Texas where the suit arose, determined title. The first time the case came before the Supreme Court it was not considered on its merits; the only point decided was that the officers in charge, as servants of the government, could plead adverse possession. The contention, sustained in the lower court, had been that as the United States is not bound by the statute of limitations, it could not plead limitations; that if the United States were unsuable, then there was no time at which the plaintiffs could have brought action, hence no time from which limitations could begin. The Supreme Court said, however, that as an action could have been brought against the officers if in fact they were in the wrong at any time after adverse possession had been taken, they were entitled to plead on behalf of the United States adverse "possession in themselves as individuals"; that their possession as agents of the government would not protect them if in the wrong; but their possession enured to the benefit of the United States.[8] The case was retried below, the plea of limitations admitted, but found not to be supported by the evidence. Title to part of the land was adjudged to be in the United States, part in the plaintiff, and judgment was given for the plaintiff as to the part proved, and joint possession of the whole. This the Supreme Court held to be "directly against the United States and their property, and not merely against their officers."[9] As, repeating, the United States never holds except through its officers, it is difficult to reconcile this with the Lee case. The fact that this suit determined title, while the Lee case determined only possession, does not seem important. In the Lee case, if the United States, not concluded by an action against its officers, occupied the land again by its officers, they could again be ejected; if it

[8] Stanley v. Schwalby, 147 U. S. 508, 519, 37 L. Ed. 258.
[9] Ibid., 162 U. S. 155, McClain, Cas. Const. Law, 673, 676.

sought by court action to gain possession, it would need to prove its title. In both the Lee and Stanley cases, the title of the United States was relied upon as the defense; the second time logic triumphed.

Apart from the (sometimes) liberal provisions where specific property is involved, the cases seem in hopeless confusion as to when an action will be considered against the state, and when against the officers only. Examples of both will be given, at least for the sake of comparison, and as evidence of this confusion. On the one hand we have cases where "the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will operate . . ." [10] under which circumstances the suit cannot be maintained.

Slaves sold under order of an irregular prize court, and held by the Governor of Georgia as forfeited for violation of an act forbidding their importation into the state, could not be recovered by the real owner in a suit against the Governor, such suit being in fact a suit against the State.[11]

Commodore Belknap with knowledge of the existence of a patent had infringed it in building a caisson gate at Mare Island for the Government Navy Yard, and such gate had come into the possession of the United States. The patentee prayed for damages, destruction of the gate, and an injunction to prevent further infringement. The United States claimed possession of the gate, title to it, and denied that Belknap had any personal interest in the matter. The court denied the relief sought by the plaintiff, saying that the property was in the possession of the state; the defendant had no interest, but the entire adverse interest was in the United States, against whom alone the decree would effectively operate; that an attempt to control the use of property by the United States by controlling the official action of its officers made the United States an indispensable party. The

[10] Pennoyer v. McConnaughey, 140 U. S. 1, 36 L. Ed. 363, 365.
[11] Georgia v. Madrazo, 1 Pet. 10, 7 L. Ed. 73.

patentee's only remedy was a suit at law against Belknap for damages.[12]

Indians had ceded certain land to the United States to be held in trust for them upon certain conditions, which it was claimed were violated by an Act of Congress, under which the Secretary of the Interior was purporting to act. A bill was filed praying that the Secretary be restrained from carrying out the Act, and for an accounting. The Secretary had no interest in the proceeding; it was in effect a suit to restrain the United States.[13] The Superintendent of Public Works of a state was held not subject to a libel in personam for an injury done by a boat under charter to him; that also was a suit against the State.[14] The Secretary of the Treasury may not be enjoined by a taxpayer from carrying out the measures of an alleged unconstitutional appropriation bill; the taxpayer's interest is too "minute and indeterminable."[15]

Virginia had issued bonds which by valid contract provided the interest coupons should be receivable in payment of taxes. An injunction was asked to prevent suits to collect taxes where the tax-receivable certificates had been offered and refused.[16] The relief sought was held to be against the defendants in their representative capacity as officers of the state, not as individuals, and so the suit was against the state.[17]

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[12] Belknap v. Schild, 161 U. S. 10, 24, 40 L. Ed. 599. Harlan, dissenting, felt that United States was bound to compensate the patentee under the 5th Amendment; that if the United States could not be sued, then the only remedy was by injunction; if refused, "then the Government may well be regarded as organized robbery so far as the rights of patentees are concerned" (161 U. S. 27, 28). A similar decision was rendered in an action to enjoin a post master from the use of a stamp cancelling machine that infringed a patent (International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. Ed. 1134).

[13] Maganab v. Hitchcock, 202 U. S. 473, 50 L. Ed. 1113.

[14] Ex parte New York, 256 U. S. 490, 65 L. Ed. 1057.

[15] Massachusetts v. Mellon, 262 U. S. 447, 67 L. Ed. 1078.

[16] An injunction had previously been allowed to prevent tax-collectors from distraining on goods of those who had offered the certificates (Allen v. B. & O. R. R., 114 U. S. 311, 27 L. Ed. 300). Harlan, in the instant case, felt enjoining suits was no more an action against the state than enjoining distraint.

[17] In re Ayers, 123 U. S. 443, 31 L. Ed. 216. Cf. Exp. Young,

Louisiana filed an original Bill in Equity against the Secretary of the Interior to establish its title to certain lands, and to enjoin the defendant from disposing of them. There was some question as to whether Louisiana did have good title; but this involved questions on which the United States would have to be heard, making it a necessary party, and depriving the court of jurisdiction.[18] A state cannot enjoin the Secretary of the Interior from granting away swamp lands in an Indian reservation within the state, where the legal title is in the United States.[19] Even where a valid contract is cancelled by a government officer, under conditions permitting an action for damages in the Court of Claims, no suit to prevent such annulling of the contract will be allowed, as that is to force on the United States by court action the performance of a contract.[20] So a suit to enjoin federal fiscal agents from collecting assessments in excess of a specified amount agreed upon by the United States as the selling price of water rights to the plaintiff was a suit against the United States, as its real effect was to compel specific performance of the contract of sale.[21] Nor can a state institute an original bill to review the official judgment of the Secretary of the Treasury as to rates on the importation of sugar under the Tariff Act and a treaty with Cuba, even though the state was itself interested as a sugar producer.[22]

On the other hand, where suits are brought against defendants who profess to be officers, but are acting under what is alleged to be an unconstitutional statute, such suits "whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction

infra. In McGahey v. Virginia, 135 U. S. 662, 34 L. Ed. 304, the provisions under which these suits were tried, were held to be unconstitutional.

[18] Louisiana v. Garfield, 211 U. S. 70, 53 L. Ed. 92.
[19] Oregon v. Hitchcock, 202 U. S. 601, 50 L. Ed. 935.
[20] Wells v. Roper, 246 U. S. 335, 62 L. Ed. 756.
[21] Plaine v. Horne, 196 Fed. 582.
[22] Louisiana v. McAdoo, 234 U. S. 627, 58 L. Ed. 1506.

to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendants the performance of a plain legal duty, purely ministerial," [23] are allowed.

Suit by a citizen of California to enjoin the Board of Land Commissioners of Oregon from selling lands claimed by the plaintiff, as forfeited to the state by non-compliance with conditions of sale by the plaintiff's grantor, was not a suit against the state, for the act under which the defendant claimed to act was unconstitutional, as it impaired the obligation of the contract of the state with such grantor.[24]

Suit was brought against the members of a State Board of Transportation to enjoin them from enforcing a state statute regulating railroad rates, claimed to be confiscatory and violative of the 14th Amendment. This was considered a suit "against individuals, for the purpose of preventing them, as officers of the state, from enforcing an unconstitutional enactment to the injury of the plaintiff," and not one against the state.[25] So where Texas had granted to a railroad corporation of that state sections of land along the prospective line of a railroad which was later actually laid out, and the Commissioner of the Land Office and the Governor, purporting to act under a statute of the state forfeiting the lands to it, sought to sell the same, they were enjoined from interfering with the rights of the road.[26]

An injunction against irrigation officials to prevent them cutting off the water supply of the complainant for failure to pay illegal charges was held not to be a suit against the United States,[27] nor was one to restrain the Secretary of the Interior from the violation of a plain ministerial duty.[28] Likewise an injunction was allowed to restrain a board of liquidation, consisting of the Governor and other officers, from issuing bonds similar to those held by the plaintiff, on

[23] Pennoyer v. McConnaughey, 140 U. S. 1, 35 L. Ed. 263, 265.
[24] Ibid.
[25] Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819.
[26] Davis v. Gray, 83 U. S. (16 Wall.) 20, 21 L. Ed. 447.
[27] Magruder v. Belle Fourche v. W. U. Assn., 219 Fed. 72.
[28] Gilbert v. Ballinger, 36 App. D. C. 203.

the ground that such action would impair the value of the bonds and violate the obligation of the contract with the State.[29] In general, a suit to restrain an excess of authority, or to compel "officers to cease violating what is claimed to be the law" are not suits against a state.[30]

Certain contractors with the government had been allowed credits in their accounts for extra services rendered. The succeeding Post Master General disallowed these. On appeal to Congress for assistance, that body decided that the Solicitor of the Treasury should examine the claims, and allow such as were found to be just, which were to be credited to the contractors' accounts by the Post Master General. The Solicitor did allow certain items, only part of which were credited by the Post Master. Mandamus was issued against him, on the ground that it was to enforce a mere ministerial act, which he had no authority to refuse or control.[31]

When the state is not identified with the wrongful act of an officer, damages may be recovered against him. The defendant had, as Bank Commissioner, taken charge of a bank and its assets, and in violation of his duty had refused to pay the plaintiff on his certificate of deposit. For this neglect of duty he was liable.[32] But where, instead of an action for damages against the officer personally, a judgment against the fund to the extent of the deposit and interest, which by law the Commissioner was supposed to pay, was sought, it was held to be a suit against the state.[33] The act relied upon was the same in both cases; in one, the immunity of the state was no shield; in the other it was.

It will be remembered that in the *Ayers* case, an injunction which sought to prevent the prosecution of tax collection suits was refused. Minnesota created a railroad commission,

[29] Louisiana B. of Liquidation v. McComb., 92 U. S. 531, 23 L. Ed. 623.

[30] Weiland v. Pioneer Irrigation Co., 238 Fed. 519, aff. 259 U. S. 498, 66 L. Ed. 1027.

[31] Kendall v. U. S., 12 Pet. 524, 610, 9 L. Ed. 1181.

[32] Johnson v. Langford, 245 U. S. 541, 62 L. Ed. 460.—State guaranty fund.

[33] Langford v. Platte Iron Works, 235 U. S. 461, 59 L. Ed. 316.

fixed rates at much lower than those prevailing, and provided for an extremely heavy fine upon the railroads and a fine of $5,000 and five years imprisonment for any agent violating these rate provisions. On petition of stockholders, an injunction was granted preventing the railroad from adopting the new rates and forbidding the Attorney-General to enforce them. The Attorney-General sought in the state courts a mandamus to compel the railroad to adopt the new rates, and then was jailed by the United States court for violating the injunction. The issue thus was squarely presented of the right to enjoin a state official from enforcing a state law. The Supreme Court held that the state rates were unconstitutional, and that where, as here, the penalties for violation were so severe as to prevent the railroad from taking a chance of setting up the unconstitutionality in the course of an ordinary suit against it to enforce the penalty, it could enjoin prosecution under the state statutes.

> The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threatened and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.[34]

About the only difference between the *Ayers* and the *Young* cases is that in the latter the penalty and danger from the suits were more severe. It is submitted that this is not a 'legal' distinction. If the suit in one case was against the state, so it was in the other; if enjoining the action of the officer was against the state in either, it was against the state[35] in both. The *Young* case was certainly just; but it does complicate any attempt to deduce a general rule. It is clear that the old distinction between negative and affirmative

[34] Ex parte Young, 209 U. S. 124, 156.

[35] It should be noted that this state immunity does not apply to a municipality in the exercise of ordinary corporate functions (Hopkins v. Clemson College, 221 U. S. 636, 55 L. Ed. 890). For an excellent article on the responsibility of municipalities see Borchard, Government Liability in Tort, 34 Yale Law Journal.

action—holding that 'illegal' acts could be made the basis of defense by a citizen in an action against him, but not the basis of direct action against the state [36]—is attenuated, if not untenable. The general statement that if a suit is against the officer it is allowed, if against the state it is not, is a statement of effect rather than cause; it lends no assistance in deciding when a suit is to be considered in either class. It really seems that each case will be decided upon its particular merits, and upon the psychological reaction of the then Justices to the words "theory" and "justice"; regardless of the decision of the court when the suit is in name against officers, there will be little difficulty in finding precedent to support it. Law may be that which the courts will enforce [37]; in these cases it seems to be that which the court in any particular instance will enforce.

Personal Responsibility of Officers.—When the suit is against the officer to recover from him, personally, damages for his action as officer, much the same principles are applied that we found invoked in England, though in the United States there is the added complication of the position of officers relying upon an unconstitutional statute. Action lies against the immediate perpetrator, who cannot shelter himself "under any imagined immunity of the government from due responsibility." [38]

> In actions at law . . . where (an officer) is sued, as for injuries to person or property, real or personal, or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant he must show it to the court and abide the result. . . . It is no answer for the defendant to say I am an officer of the government and acted under its authority unless he shows the sufficiency of that authority.[39]

> But the exemption of the United States from Judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a

[36] McGahey v. Virginia, 135 U. S. 662, 684, 34 L. Ed. 304, 312; Hans v. Louisiana, 134 U. S. 1, McClain, 702, 712.
[37] Gray, Nature and Sources of Law, sec. 191.
[38] Story, Commentaries, sec. 1671.
[39] Cunningham v. Macon &c. R. R., 109 U. S. 446, McClain, 728, 733.

> private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. . . . Such officers or agents, although acting under the orders of the United States are therefore personally liable to be sued for their own infringement of a patent.[40]

Accordingly the orders of a superior, even of the President, afford no defense to an officer if in law his act is unjustified. An Act of Congress provided for the seizure of American vessels bound to France. The President by Executive orders instructed naval officers to seize vessels bound to or from France. One was so seized on the trip toward the United States. Except for the Act of Congress, there would have been no right to seize vessels under either condition; the Act gave the right, and defined its limitations. The order of the President, even though based on the Act, was in fact inconsistent with it, therefore illegal, and the officer relying thereon had in law no justification and was liable in damages.[41]

The interpretation of law by the heads of the Departments will be of great persuasive weight before the courts, but if such interpretation is in fact erroneous, the instructions of the Department heads offer no defense to the inferior officers in a suit against them.[42] This obviously places such inferior officer in a rather embarrassing situation; he is bound to obey the order of his superior or be dismissed; but if such order is in law unjustified, he is liable to a civil suit for damages.

This difficulty was especially pronounced in the cases of collectors of the revenue. The revenue laws leave much room for interpretation, which is usually done by the proper officers in the Treasury Department; but if these interpretations should prove erroneous, the collector could be held personally liable. His good faith and reliance on his instructions would relieve him from exemplary damages only, not from compensatory. The courts recognize that this may cause purely ministerial minor officials "some personal inconvenience," but rigidly enforce the rule that the officer's conduct must

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[40] Belknap v. Schild, 161 U. S. 10, 18, 40 L. Ed. 599.
[41] Little v. Barreme, 2 Cr. 170, 2 L. Ed. 243.
[42] Greely v. Thompson, 10 How. 223, 13 L. Ed. 397.

be justified at law. The further customary comment of the court is that "as the government in such cases is (morally but not legally) bound to indemnify the officer, there can be no eventual hardship." [43] For many years the relief mentioned by the court existed in the legal mind alone, but eventually the dictates of common honesty led to statutory provisions that when any recovery by a private person against a revenue officer was had for money collected by such officer and paid into the Treasury in the performance of his official duty, and the court certifies that there was probable cause for such action, or that it was directed by the Secretary of the Treasury, no execution should be issued against such officer, but the judgment recovered should be paid out of the proper appropriation in the Treasury.[44]

Officers have no implied power to contract,[45] nor is the United States responsible for their ultra vires acts,[46] but if the officers contract in their public capacity, the contract inures to the benefit of the government and becomes its obligation, not that of the officers. "The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account." [47]

An action of covenant was brought against one Dexter, late Secretary of War, for not keeping in good repair and not returning in good condition premises leased by the plaintiff to him for the officers of the War Department. The lease had been made to Dexter and his successors, the covenants had been made by him, and the lease was sealed by him in his own name. The court did not consider this sufficient evidence of an intent to bind himself personally; mention of his "successors" showed an intent to contract for the public.[48]

[43] Tracy v. Swartout, 10 Pet. 80, 98, 9 L. Ed. 354; Elliott v. Swartout, 10 Pet. 137, 9 L. Ed. 373.
[44] Rev. St. 989, Comp. St. 1635.
[45] Lee v. Munroe, 7 Cr. 366, 3 L. Ed. 373.
[46] U. S. v. Maxwell Land-Grant Co., 21 Fed. 19.
[47] Hodgson v. Dexter, 1 Cr., 345, 363-364, 2 L. Ed. 130.
[48] Ibid.

In the United States, not only is the officer not protected by the illegal order of his superior, but he also acts at his peril in carrying out what appears to be a duly enacted law, unless it has received the sanction of the Supreme Court, for if that body should ever declare the "law" unconstitutional, it follows that it never was a law; that the officer who relied on it had no right to do so, and is consequently liable for the result of his act. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it is, in legal contemplation, as inoperative as though it had never been passed." [49]

Virginia issued bonds containing coupons receivable for taxes. A later act forbade their receipt for taxes; relying on this act, an officer seized certain property of the plaintiff who had refused to pay when his tender of coupons was refused. The Supreme Court held the act in question, relied on by the defendant, was unconstitutional and no defense to the officer, who thus became a wrongdoer. What was the source of the unconstitutional act; why did it afford no protection, even though ineffective as a law?

> . . . while it is true, in respect to the Government of a state . . . that the maxim that the King can do no wrong has no place in our system of Government, yet it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its Government, and not to the State. For, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the Supreme Law, the Constitution of the United States, is not the word or deed of the State but is the mere wrong and trespass of those persons who falsely speak and act in its name.[50]

If lawful, it is the act of the State, and of course a justification; if unlawful, it is not the act of the State, though passed by the same formalities, but is the illegal act of the Government, and no justification. Here it is apparent we start from the conclusion and work backward; before it can be known whether an act is one of the State, on which the officer may rely, or one of the Government, on which he may

[49] Norton v. Shelby County, 118 U. S. 425.
[50] Poindexter v. Greenhow, 114 U. S. 270, 29 L. Ed. 185.

not, we must await the decision of the court of last resort. The "law" is not law because it is the act of the State, but it is the act of the State because it is law. The whole matter would be an amusing display of metaphysico-juristic gymnastics were it not that the situation is fraught with serious consequences to the officer who at his peril must know more law than two inferior judicial tribunals and four dissenting Supreme Court Justices!

Of course, it not argued that an unconstitutional "law" should be enforced, or that ordinarily it can be treated as anything but a nullity, but it at least furnishes probable cause; the officer is entitled to presume that the Legislature would not overstep the bounds of its constitutional power.[51] It would seem that the least that could be done would to make a provision similar to that applied to revenue officers, and hold harmless the officer who had acted in reliance on an act, duly enacted, but later decided to be unconstitutional.

Act of State.—It seemed for quite some time that the United States would follow out the "rule of law"—subjecting the officer to exactly the same liability for his acts that is exacted of private citizens by the municipal law—even more closely than in England. Really, development has been quite similar in both countries; there have been engrafted at least the rudiments of a system of administrative law—relieving the officer of liability in at least some cases where he acted in good faith—and now, though it is usually considered as confined to England alone, the doctrine of "Act of State" seems to have been expressly adopted into American law.

In a case decided as early as 1804, the Act of State doctrine was, by implication, rejected. A vessel belonging to a Danish subject was seized under Presidential regulations, promulgated supposedly in accordance with the Non-Intercourse Act. The court found that the ship, though subject to detention under the Executive orders, was not so subject

[51] State v. Goodwin, 123 N. C. 697, McClain, 824, 826.

under the provisions of the Act. Damages were accordingly allowed against the captain of the captor. Here was an act done against an alien, by virtue of a prior Executive authorization—yet because in fact a violation of law, the officer was held.[52]

This application of the "rule of law" was, however, repudiated in two cases arising some hundred years later, one in connection with actions concerning aliens in Cuba, the other in the Philippines. An alien brought suit under the Revised Statutes[53] against the former military governor of Cuba. The defendant, while acting as governor during the American occupation, had abolished without compensation the franchise to slaughter cattle in Havana. This valuable franchise, in the nature of an incorporeal hereditament, belonged in the family of the plaintiff. The defendant pleaded that by the Platt Amendment the United States had ratified his acts. In declining the relief asked by the plaintiff, the court said:

> But it has been held that a tort could be ratified so far as to make an act done (by an agent) in the course of the principal's business, and purporting to be done in his name, his tort . . . and it may be assumed that this is the law as to the wrongful appropriation of property which the principal retains. . . . The old law which sometimes, at least, was thought to hold the servant exonerated when the master assumed liability . . . still is applied to a greater or less extent when the master is the sovereign . . . it is impossible for the Courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act.[54]

The basis of the opinion is not that the officer committed a tort but by ratification is exempted from the jurisdiction of the municipal courts; it is rather that his act as agent is related back to his principal, who is immune. The result is of course the same as if the usual reasoning in the Act

[52] The *Charming Betsy*, 2 Cr., 64. The owner had formerly been an American citizen, but at the time of the action complained of was a Danish subject. It was interesting to note that in this instance Congress did reimburse the defendant.

[53] Rev. St. 563, allowing suit by an alien in the United States courts in tort only, for violation of a treaty or the law of nations.

[54] O'Reilly de Camera v. Brooke, 209 U. S. 45, 52, 52 L. Ed. 676.

of State doctrine was employed. In a slightly later case this English doctrine was recognized in unequivocal language.

Forbes, while Governor-General of the Philippines, had expelled certain aliens. Such action was really ultra vires, and would have rendered him personally liable, but it was ratified by the Philippine Legislature—an action not difficult for the American Governor-General to secure at that time. The Supreme Court dismissed an action brought against him, saying that the Philippine government had the power arbitrarily to expel aliens, and consequently could ratify such (illegal) action on the part of the Executive.

> But it is generally recognized that in cases like the present, where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act.[55]
>
> It is held in England that an act of state is a matter not cognizable in any municipal court. . . . And that was the purport of the Philippine act declaring the deportation not subject to question or review.[56]

In addition to recognizing the possibility of an officer, in regard to his treatment of aliens, occupying a legal status different from ordinary citizens, we have by legislation exempted particular classes of officers from the usual legal responsibility for their acts, though we as yet have nothing corresponding to the English Public Authorities Protection Act.

Revenue officers are protected from personal responsibility for money paid into the Treasury, in performance of an official duty, if such collection was made with probable cause, or under the direction of the Secretary of the Treasury.[57] If a suit is brought against an officer for seizure of goods under the importation acts, and the plaintiff is non-suited, or the judgment is against him, he is liable for double costs.[58] Should a seizure be made under Acts of Congress, and the

[55] Chuoco Tiaco v. Forbes, 228 U. S. 549, 556, 57 L. Ed. 960. It is scarcely necessary to add that the opinions in this and the preceding case were delivered by Mr. Justice Holmes.

[56] Ibid., 558.

[57] Rev. St. 989, Comp. St. 1635.

[58] Rev. St. 971, Comp. St. 1612.

plaintiff in an action for the goods receive a favorable verdict, he cannot, if probable cause for the seizure be shown, recover costs, nor may he sue the person who made the seizure, nor the prosecutor.[59]

Provision has recently been made whereby the various departments are authorized to adjust claims accruing after April 6, 1917, "on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the government, acting within the scope of his employment." A one year period of limitation is provided.[60] In this connection, "employee" includes enlisted men in the Army, Navy and Marine Corps.[61]

Another recent Act, allowing proceedings against the United States by libel in personam for injury occasioned by Government vessels will probably result in relieving naval officers from all personal responsibility.[62]

These are but indications of the relaxation of the "rule of law"; an evidence of the humanizing of the service. Deviations from the rule in these cases might lead the non-legal mind to question the validity of the principle on which the rule is based.

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[59] Rev. St. 970, Comp. St. 1611.
[60] Act of Dec. 28, 1922, c. 17, s. 2, '23 Supp. U. S. Comp. 6402 b.
[61] Ibid., s. 1, '23 Supp. U. S. Comp. 6402 a.
[62] Public Vessels Act, March 3, 1925, 1925 A. M. C. 631.

CHAPTER IX

State Property in Domestic Courts of Admiralty: England and the United States

In England, as in the United States, the Crown cannot be directly impleaded without its own consent,[1] nor indirectly through actions against officers, or the property of the Sovereign. Accordingly, the Crown property is not subject to distraint,[2] nor may it be indirectly affected by a writ of mandamus[3] or by an action of ejectment against officers[4]; nor can the ruling sovereign be forced to give effect to the alleged Last Will and Testament of his predecessor, by an action against the Procurator-General.[5] In every case the result of the action is considered, and as the result of the above efforts would have been to control the Crown by control of its property, or agents, or person, the actions were denied.

In admiralty proceedings the same result has been reached in England. A proceeding against a government ship is considered merely as a means of impleading its owner. This attitude was not always held in England; in the United States it was not accepted in its fullest extent until within a few years. It would have been possible to consider that an action against a ship was not really against the owner, but the vessel itself. To those who "go down to the sea in ships" there has always been a tendency to treat the ship as a living creature; it contracts, it commits torts; it incurs liabilities, and to it did those aggrieved look for redress.[6] The ship was personified, with a will and existence of its own. Treating the ship in such a manner, it would make no difference who

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[1] Above, chap. ii.

[2] Secretary of State for War v. Wynne, (1905) 2 K. B. 845, 22 T. L. R. 8.

[3] Queen v. Powell, (1841) 1 Q. B. 252, 4 Per. & Dav. 719.

[4] A. G. v. Hallett, 15 M. & W. 97.

[5] In re the Goods of King George III, (1822) I Addams Ecc. 255.

[6] This is still seen in bottomry bonds, where the only security is the ship itself (Hughes, Admiralty, 2 ed. p. 94). The same result is accomplished, if not recognized, in our Limited Liability Acts (Hughes, p. 345 ff.).

is the owner, since in an action in rem, against the ship, the presence of the owner is not necessary; he need have only constructive notice that he may appear and defend. To the extent of the value of the ship, it would seem that under the personification doctrine the party injured by the action of the ship would have redress against it, regardless of its owner. It is because this view at one time seemed possible in England, and established in the United States, and because of its bearing on the attitude of the courts of those countries in regard to the property of a foreign sovereign [7] that a separate chapter has been deemed desirable.

England.—Dr. Lushington held the view that the ship itself was liable for its actions; that the only instance where the court would not hold the vessel liable for damage it had done was in the case of damage resulting from the actions of a compulsory pilot. Then the owner was relieved on the theory of compulsion; on the principle that the pilot was not the servant of the owner, and could not obligate his property.[8] But in any case where proceedings were allowed against the ship, recovery would be limited to its value; no personal liability of the owner could be asserted or enforced for the wrongdoing of his ship.[9]

The theory now accepted in England, however, is that "every proceeding in rem is in substance a proceeding against the owner of the ship," so that no maritime lien can arise unless there is some personal liability of the owner.[10] The owners of a vessel abandoned it into the hands of the port officials of Gibraltar after it had been sunk in collision. These latter maintained improper lights, causing another vessel to be injured upon the wreck. In holding neither the wreck nor its owner liable the court said the control of the wreck had been properly transferred to the port officials,

[7] Below, chap. xi.
[8] The *Ticonderoga*, (1857) Sw. 215.
[9] *Volant*, 1 Wm. Rob. 383, 388.
[10] The *Castelgate*, 1893 A. C. 38, 52—master could not create maritime lien where to his knowledge the charterparty did not allow a pledge of the owner's credit (The *Ripon City*, 1897 P. 226).

although the owner still retained property rights in her.[11] "It was suggested in argument that, as the action against the (wreck) is an action in rem, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized."[12] This is a plain repudiation of the theory that the ship itself is the wrongdoer; if it were, it would be immaterial who was in control.

Consequently in England, if an appearance has been entered by the owner in an admiralty case and the judgment exceeds the amount of the sum originally claimed in the action in rem, the owner is personally liable for the excess, which may be collected by a fi. fa. against any of his property. Sir Francis Jeune explains this in the case of the *Dictator*, in language worthy of quotation:

> Actions beginning with the arrest of the person became obsolete in practice . . . in the last century, the last recorded instance being in 1780; and arrest of property merely to enforce appearance became rare or obsolete. . . . On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of attachment. . . . The result was that arrest became the distinctive feature of the action in rem, such arrest having primarily for its object the satisfaction of the creditor out of the property seized. But there seems no reason to suppose that the action beginning by arrest of the res altered the course or character it had hitherto assumed as to the appearance of the debtor in it; and, if that be so, it would seem clear that the full amount of a judgment, if a defendant, who might have himself been arrested, appeared, could be enforced by the means available in the admiralty court, monition and attachment, whatever the value of the property arrested was.[13]

The result was that "in England a respondent is really a defendant, and judgment goes against him for any deficiency. This was because the procedure in rem in England was in its origin not based on any theory of direct responsibility attaching to the res, but as a means of compelling the

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[11] The *Utopia*, 1893 A. C. 492, 498 (P. C.).

[12] Ibid., 499.

[13] The *Dictator*, 1892 P. 304, 313 (C. A.). See also 2 Select Essays in Anglo-American Legal History, 345.

owner's appearance. Their process to this day, though naming the ship and not the owners in terms, commands them to enter an appearance, and the arrest of the ship follows as an incident." [14]

It would seem plain that if the respondent (owner) is really a defendant, the Crown can not be made to respond where its property is involved; as the attachment of the vessel is an incident of the proceeding against its owners, if such owners are exempt from jurisdiction, no proceeding can be begun, so no attachment will lie. Even salvage, then, the foremost of maritime claims, would not be available against government ships. There is an early decision of Sir W. Scott allowing salvage against a "transport in his Majesty's service" but this was probably because the Lords of the Admiralty had entered their appearance and consented.[15] The reports are equally as uncertain in regard to Scott's action in a later case where a vessel engaged in H. M. Post-Office service, but privately owned, was libelled for wages. His Lordship considered the objection that the ship was engaged in the public service was "not immaterial"; he could not "but be alarmed at the danger" from detention of vessels of this king. The deputy registrar reported that notice had been given in other cases of this kind, and the Post Office had not objected, so the claim was allowed.[16]

There can now be no doubt that a vessel owned by His Majesty (sub. nom. Dominion of Canada) is not liable in rem, because of the immunity of its owner.

> . . . it is in vain to argue that, where the property belongs to the Crown, the Crown can be impleaded, whether in this form or in any other form. Where you are dealing with an action in rem for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner, and if the owner is the King, the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own Courts.[17]

Their lordships then proceeded in the strongest possible

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[14] Hughes, Admiralty, p. 402.
[15] The *Lord Nelson*, Edw. Adm. 79. (1809).
[16] The *Lord Hobart*, 2 Dods. 100, 103. (1815).
[17] Young v. The *Scotia*, L. R. 1903 A. C. 501 (P. C.).

language to tell the Canadian government it was its duty to pay the salvage claim, and not to rely on this "technical objection"; their Lordships would "deeply lament" to learn that the Canadian government, after being advised of the circumstances, had refused compensation. Such an action would warn all salvors to refuse assistance to government vessels.[18]

This exemption applies as well to requisitioned ships while in the service of the government. It is true that requisition does not change the ownership, which continues in the owners as of the time of the requisition, and that on cessation of use by the Crown the ship returns to her owners; but "so long as the ship shall remain under requisition by and in the service of the Crown" she is immune from process.[19]

In cases where damage has been done by a government ship under conditions which but for the immunity of its owner or operator would allow a proceeding against the owner, the officer actually in charge of the operation of the ship at the time the damage was done is held personally liable,[20] even though the vessel be a warship.[21] Although in such cases the Lords of the Admiralty cannot be compelled to appear and accept responsibility, it is customary for them to do so, in which case of course the officer is relieved, and judgment goes against the Admiralty.[22] The same practice prevails where the vessel is attached to a Department other than the Admiralty; the proper officer of the Department usually substitutes liability of the service for that of the commanding officer.[23]

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[18] Ibid., 508.

[19] The *Broadmayne*, 1916 P. 64, 70-71 (C. A.). In the *Tervaete*, 1922 P. 259, the court held that where a ship requisitioned by a foreign government had been released to private hands, it would not be liable for torts committed while under requisition. Undoubtedly this will be applied as well to ships owned or requisitioned by the English government. But a requisitioned ship, when released to private hands is, in England, subject to salvage services rendered while under requisition. The *Meandros*, 41 T. L. R. (P.) 236. See p. 189.

[20] The *Volcano*, 2 W. Rob. 337 (1844).

[21] The *Birkenhead*, 3 W. Rob. 75. (1848).

[22] The *Athol*, 1 Wm. Rob. 374 (1842).

[23] The *Lord Hobart*, 2 Dods. 100 (1815).

United States.—In the United States[24] it seemed that from earliest times a different conclusion had been reached and that the ship itself was the actor, and hence the responsible party. This was well expressed by Mr. Justice Brown:

> Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appear to be some doubt . . . the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owners or charterers.[25]

This had been illustrated in an earlier case, where the vessel was held liable for damage resulting from the negligence of the pilot whom the vessel, under penalty, was forced to accept. Mr. Justice Swayne, who delivered the majority opinion, commented on the English doctrine that "the liability of the ship and of the owner are convertible terms," neither being liable unless both were. But the admiralty law in the United States is not derived from the civil law of master and servant, nor from the common law, but from commercial usages and jurisprudence.

> According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances.[26]

Marshall, in a case on Circuit, recognized the personality of the ship. In condemning a vessel for a violation of the embargo laws although the owner was not at fault, he treated the proceeding as one against the vessel for an offense by the vessel, which is none the less an offense because done against the will of the owner.[27] Justice Story was of the same opinion, and condemned a vessel for acts of piracy committed

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[24] See E. T. Fell, Recent Problems in Admiralty Jurisdiction, in Johns Hopkins Univ. Stud. in Hist. and Political Science, Ser. xl, No. 3, for an account of practice before 1920.

[25] The *Barnstable*, 181 U. S. 464, 45 L. Ed. 954 (1900).

[26] The *China*, 7 Wall. 53, 19 L. Ed. 67, 71, 73.

[27] The *Little Charles*, 1, Brock, 247, 254.

without the knowledge or consent of the owners. The vessel was itself the offender.[28]

The English cases proceeded on the theory that a maritime lien was but a privilege to arrest a vessel; that it became an encumbrance only on actual attachment. In the United States it is recognized that the maritime lien is not a mere matter of procedure, but a proprietary interest in the vessel, which may be "enforced directly against the thing itself by a libel in rem, in whosesoever possession it may be."[29] The vessel itself is the contracting party[30] or the tort-feasor—"ownership, proprietorship, agency, attorneyship and the like being ignored. . . . In the admiralty, the right of the creditor is to find, sue and arrest her as if she were a living person." The common law ideas of tort liability incurred only by the owner or his authorized agent have no place in the admiralty.[31]

Carrying out this idea of the existence of the lien, though perhaps unenforcible because the vessel is in the possession of one exempt from suit, Justice White held the City of New York liable in personam for a tort committed by the negligent operation of a fireboat. Had it been the State of New York, the tort would still have existed, but there would have been no jurisdiction to enforce liability. "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction."[32] The lower Federal courts considered that a tort by a vessel in govern-

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[28] The *Malek Adhel*, 2 How. 210, 233, 11 L. Ed. 239, 249.
[29] The *Samuel Little*, 221 Fed. 308, 316 (C. C. A. 1915).
[30] Hughes, Admiralty, p. 402.
[31] Marney v. The *Sidney L. Wright*, (1883) 11 Fed. Cas. No. 6082 A., pp. 565, 566-567.
[32] Workman v. The Mayor, 179 U. S. 552, 570, 45 L. Ed. 314, 324. This case is identical in the nature of the circumstances in which it arose with the "Fidelity," 8 Fed. Cas. No. 4758, p. 1189, except that the Fidelity was a libel in rem. There Waite, Cir. J., denied the right to sue New York City, holding that the immunity arose not from want of power to sue the owner, but from want of liability on the part of the vessel.

ment hands created a lien, unenforcible because of government immunity from process, but capable of enforcement upon transfer to a suable individual. The courts felt that they always had "jurisdiction over the subject-matter, and may proceed as soon as the arrest becomes legal" through transfer.[33]

When we seek to apply the conclusion that the ship itself is to be considered as a living, volitional being, to which a lien may attach from its own actions, we find a most interesting line of cases. A government transport was held not liable for salvage in a case arising during the Civil War, immunity being granted apparently because of political conditions.[34] But a vessel chartered to the government was held liable in a proceeding on a bottomry bond.[35]

Goods owned by the United States are subject to general average. The United States brought action of trover against one Wilder, owner of a vessel that had salved goods, some of which belonged to the United States, and the delivery of which Wilder had refused until the United States offered an average bond. Justice Story, who delivered the opinion on circuit, held that the goods were impressed with a lien and could be retained by Wilder until his claim was satisfied. After commenting on the granting of a lien for average, he said:

> It is said, that, in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deduced, that there can be no remedy in rem. Now I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest grounds why the remedy in rem should be held to exist.
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> I cannot but think that the circumstance, that the United States can in no other way be compelled to make a just contribution of its

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[33] The *Freedom*, 267 Fed. 929, (1919).

[34] The *Thomas A. Scott*, 90 Fed. 746, a case decided in 1864, but omitted from the collection of Fed. Cas. The Tucker Act has allowed salvage on government vessels, (U. S. v. Morgan, 99 Fed. 570) and this applies although both salvor and salved are government vessels (The *Olockson*, 281 Fed. 690).

[35] The *Othello*, 18 Fed. Cas. No. 10, 611, p. 90.

share in the general average, so far from constituting a ground to *displace the lien* created by the maritime law, does in fact furnish strong ground for enforcing it. . . . The argument therefore, addressed to this court, on behalf of the government, ab inconvenienti, does not seem to have any very solid foundation. On the other hand, the argument ab inconvenienti on the other side is very cogent and persuasive; for it is beyond doubt that *if there be no lien, there is no remedy* to enforce an incontrovertible right.

And I cannot but think, that public policy will be promoted, and not impaired, by holding, that the remedy for the reward is not uncertain or precarious, but *attaches* as a lien, primarily in rem, and does not await the slow, or tardy, or distant justice of the government in awarding it.[36]

Goods of the United States in a private ship were held liable for salvage. Six hundred bales of cotton, the property of the government, were libelled for salvage. The circuit court found that the salvors were entitled to salvage on the cotton, but refused to allow a lien on the property of the United States. The Supreme Court decided that as the cotton had been entrusted to the master of the private vessel and had been libelled before it reached the consignee, it was not in the possession of the United States, which was therefore forced to come in as plaintiff (claimant), and the salvage lien was good.[37] So, also, where goods, shipped from a southern port on a common carrier bound to receive all cargo offered, were claimed as a prize at their destination (New York), they were first subject to the payment of freight.[38]

Where, however, the property of the government, which has been salved, has no pecuniary value and would be incapable of sale, no recovery of salvage can occur. Accordingly the mails were held exempt from salvage contribution.[39]

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[36] U. S. v. Wilder, 28 Fed. Cas. No. 16694, pp. 601, 602, 3, 4. The value of this case as a precedent for action against government goods has been attacked on the ground that the United States here was a plaintiff and that, when forced to resort to its courts, it is subject to the ordinary defenses. This, however, is not an usual case of the government as plaintiff; here it came in to recover goods admitted to be its, but held as security for a lien. The italics in the quotation are mine.

[37] The *Davis*, 10 Wall. 15, 19 L. Ed. 875.

[38] Re 858 Bales of Cotton, 8 Fed. Cas. No. 4318, p. 388.

[39] The *Merchant*, 17 Fed. Cas. No. 9435, p. 35. The author has heard of an analogous case where slaves were saved from a wreck and brought into a state where slavery was forbidden; as they had no value there, there could be no salvage (Cf. Hughes, Admiralty, p. 140).

In the Revenue Cutter No. 1, a proceeding in rem was allowed to recover the value of materials furnished in the building of the vessel, which at the time of the libel was in government hands. The United States claimed the vessel was discharged of all liens and exempt from seizure, because in government hands, used for a public purpose. The United States had purchased the vessel, which, at that time was subject to liens for materials; the court held that the United States took no better title than that possessed by the vendor. It possessed "no muniments of title sanctified by sovereignty" that gave it a special exemption in such a case. To allow mere possession to extinguish liens would constitute a taking of property for public use without just compensation.[40]

A vessel in course of construction for the United States, but not yet accepted, was held subject to a lien for labor and materials in a bankruptcy proceeding; if the United States wished to secure posession, it had to pay valid liens.[41] Where, however, such a vessel had gotten into the hands of the United States, a state court refused to enforce such liens, although admitting their existence.[42]

Although a forfeiture relates back to the time of capture, it does not "ride over the rights derived under maritime contracts, whether they be called liens or privileges." Accordingly, the claims of seamen for wages, and of materialmen for supplies furnished, were not shut out when the vessel against which they were asserted was forfeited for engaging in the slave trade, but were held barred because of notice as to the illegal acts of the vessel.[43]

In another case, several types of claims were involved. A vessel was arrested, but not yet sold, on libels filed by seamen for wages, and by the United States for forfeiture (under the registration acts). One who proved to be a bona fide purchaser for value without notice also filed his claim. The

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[40] The Revenue Cutter No. 1, 20 Fed. Cas. No. 11,713, p. 560.
[41] The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, p. 568.
[42] Briggs v. Lightboats, 11 Allen (93 Mass.), 157, 161.
[43] The *St. Jago De Cuba*, 9 Wh. 409, 417, 419-420, 6 L. Ed. 122.

forfeiture was allowed; this shut out the purchaser, for on consummation of forfeiture proceedings the divesting of title relates back to the act incurring the penalty; but it did not avoid the rights of the seamen.[44] Neither are the liens of materialmen who without notice have furnished supplies subsequent to the illegal act avoided[45]; but an attaching creditor, who has not the proprietary interest of a lienor, is barred by forfeiture.[46]

A lien may attach to a vessel in the hands of a receiver appointed by a state court, at least if engaged in ordinary commerce at the time the alleged lien attached. When a State descends to the position of a trader, it is subject to the jurisdiction of the courts; a fortiori is this the case where the business is carried on by a receiver.[47]

With the entrance of the United States into the War, and the creation of a large merchant marine, either owned or operated by the United States, it became imperative that affirmative action should be allowed those who had been injured by the operation of these vessels. The Emergency Fleet Corporation, a corporation of the District of Columbia, was created, with provisions that ships purchased, chartered or leased by it, and employed solely as merchant vessels should be subject to the general admiralty law, regardless of the interest of the United States in such vessels.[48] The term "merchant vessel" was held to apply to the nature of the work in which the vessel was engaged, not to the department under which it was employed.[49]

In 1920, when the government had acquired, apparently permanently, a large merchant marine, the right of arrest and seizure of such merchant vessels was forbidden, and a method of procedure by libel in personam was substituted.

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[44] The *Florenzo*, 9 Fed. Cas. No. 4, 886, p. 316.
[45] North American Com. Co. v. U. S., 81 Fed. 748, C. C. A.
[46] The *Mary Anne*, Fed. Cas. No. 9,195.
[47] The *Williamette Valley*, 62 Fed. 293.
[48] 39 Stat. L. 728, 730, Comp. St. 1916, 8146 a., 8146 e.
[49] The *Jeannette Skinner*, 258 Fed. 768; The *Lake Munroe*, 250 U. S. 246, 63 L. Ed. 962.

In cases where if such vessel were privately owned or operated or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation as the case may be, provided that such vessel is employed as a merchant vessel, or is a tug boat operated by such corporation.[50]

Suit may be brought in the district where any of the parties reside, have their principal place of business, or the vessel or cargo may be found. The libellant serves a copy on the district attorney for the district, and sends a copy by registered mail to the Attorney-General. If the United States has filed a libel, in rem or in personam, a cross-libel in personam or a set-off may be filed against the United States, which proceeding has the same force as if the libel had been filed by a private person.[51]

Suits proceed as between private parties. A decree against the United States for costs and interest at 4% may be rendered. The libellant may proceed according to the rules governing procedure in rem, if such would be proper between private parties, and may in the same action seek relief in personam. The United States is not required to give bond, and may require the surrender of any given by it.[52] Provision is made so that the United States *may* assume liability in a proceeding against a vessel now privately owned, where suit is instituted for an action arising out of the previous ownership, operation or possession of the United States.[53] The Act applies only in cases arising since April 6, 1917; a two year period of limitation is enforced.[54] The United States is entitled to all exemptions and limitations of liability accorded to private owners, charterers, operators or agents of vessels.[55]

The United States and the crews of its merchant vessels

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[50] 41 Stat. L. 525, ch. 95, s. 2, '23 Supp. U. S. Comp. 1251 1/4 a.
[51] Ibid.
[52] C. 95, s. 3, '23 Supp. U. S. Comp. 1251 1/4 b.
[53] C. 95, s. 4, '23 Supp. U. S. Comp. 1251 1/4 c.
[54] C. 95, s. 5, '23 Supp. U. S. Comp. 1251 1/4 d.
[55] 41 Stat. 527, c. 95, s. 6, '23 Supp. U. S. Comp. 1251 1/4 e.

may collect salvage.[56] Any judgment, settlement or award under the Act shall be paid on presentation of an authenticated copy, by the proper accounting officers from any fund available therefor; "otherwise there is hereby appropriated, out of any in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment, or award or settlement." [57]

It will be seen that the cases heretofore cited, together with these statutory provisions, gave the citizen a far greater degree of protection from the effects of governmental action than was available at common law. There were, however, at least two classes of cases for which adequate provision had not been made. The first was for damage caused by vessels under the control of the United States, but not merchant vessels. The other was for cases where the injury had been done by a vessel while under the control of the United States, but which had come into private hands and for which the United States had not assumed liability. The practically unanimous opinion based on the cases cited,[58] and especially the decision in *The Siren,* was that as a tort done by a vessel, regardless of its operators, imposed a maritime lien on the vessel, this could be enforced when, for any reason, the court was not deprived of jurisdiction because of the immunity of the vessel's owners. Accordingly, for a tort done in governmental service, the ship could be held liable if ever it came into unprivileged hands.

The *Siren* had been captured by a vessel of the United States Navy for an attempted breach of blockade. Under control of a prize crew she was sent to Boston, but on her way ran into and sank the *Harper.* On her arrival in Boston the *Siren* was condemned as a prize, sold, and the money paid into the Treasury subject to the order of the court. The owners of the *Harper* intervened, claiming a lien for

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[56] 41 Stat. 528, '23 Supp. U. S. Comp. 1251 1/4 i.

[57] 41 Stat. L. 527, '23 Supp. U. S. Comp. 1251 1/4 g.

[58] The *Freedom,* 267 Fed. 929, 930, Workman v. The Mayor, 179 U. S. 552, 570, 45 L. Ed. 314, 324; The *Samuel Little,* 221 Fed. 308, 316; The *China,* 7 Wall. 53, 19 L. Ed. 67, 73.

the collision. This claim was dismissed by the District Court, which considered such a proceedings constituted impleading the government. It is important for the purpose of this case and that which is to follow, to remember that the effect of a forfeiture when decreed by the court is to date back the divesting of title to the time when the act incurring the forfeiture was done,[59] so that at the time the collision occurred the *Siren* was a government merchant ship in the hands of the government.

The Supreme Court, on appeal, admitted the common law immunity of the United States and of its property, but said that when the United States instituted a suit in rem, it opened for consideration all claims and equities in regard to the property libelled. Here the government was considered to be the actor in that it asked to have the property condemned and sold. This was held sufficient to subject the proceeds to "all claims which existed upon the vessel subsequent to her capture." [60]

> For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the *claim exists equally as if the vessel belonged* to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement, without its consent, and unavailable for any purpose. . . . .
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> It is true, that in case of damage committed by a public vessel a legal responsibility attaches to the actual wrongdoer, the commanding officer of the offending ship, and the injured party may seek redress against him; but this is not inconsistent with the existence of a claim against the vessel itself. . . .
>
> The inability to enforce the claim against the government is not inconsistent with its existence.
>
> The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control.[61]

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[59] The *St. Jago de Cuba*, 9 Wh. 409, 417-420, 6 L. Ed. 122; The *Florenzo*, 9 Fed. Cas. No. 4, 886, p. 316.

[60] The *Siren* v. U. S., 7 Wall. 152, 19 L. Ed. 129, 132.

[61] Ibid., 19 L. Ed. 131-132. Italics mine.

It would seem as plain as language could make it that this case decided that a government vessel, operated by government seamen, by its actions created a lien that attached to the vessel, and which, though unenforcible by affirmative action on the part of the one damaged, still was nailed to the planks of the vessel and became capable of enforcement as soon as the immunity of its owner was lost—here by the United States resorting to its courts to sell the vessel (a proceeding in rem against it). There would then, on the basis of this decision, be all the more reason to suppose that such a lien could be enforced if the vessel came into private hands. It will be seen that the decision is based, and is supportable solely on the ground, that the act of the boat created a lien. If it did not, if there was only a moral obligation, then regardless of what later was done with the vessel the courts could not recognize this claim; unless, perhaps, the United States itself informed the court that it acknowledged this as a good claim; and it is doubtful even then if the admiralty court would have had jurisdiction over it. In the *Siren,* the United States acknowledged no claim; the court considered, as plainly as words can reveal, that it was *recognizing,* not *creating* a lien, preexisting, but unenforcible because the owner was immune. The lien arose, if at all, at the time of the collision, and without the consent of the United States.[62] Apart from the fact that Justice Field used the most unequivocal language, we have further evidence that the court knew and meant what it said, for the majority opinion and its grounds of support were made the subject of an equally plain-spoken dissent by Justice Nelson.[63]

Such, however, was not the interpretation later put upon the *Siren.* A vessel had been let to the United States on a bare-boat basis, and was under the operation and control of the United States at the time of a collision with a privately owned vessel. Later the United States returned the boat, the *Western Maid,* to its owners, against whom suit was

[62] The *Florence H.*, 248 Fed. 1012, 1015.
[63] The *Siren*, 19 L. Ed. 134.

brought for the damage suffered in the collision. The point involved, and the decision of the court, are tersely stated by Mr. Justice Holmes:

> The only question really open to debate is whether a liability attached to the ships which, although dormant while the United States was in possession, became enforceable as soon as the vessels came into hands that could be sued . . . we must realize that the authority that makes the law is itself superior to it. . . .[64]
>
> The United States has not consented to be sued for torts, and therefore it cannot be said that, in a legal sense, the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so.[65]
>
> But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp.[66]

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[64] The *Western Maid* (U. S. v. Thompson), 257 U. S. 419, 432, 66 L. Ed. 299.

[65] Ibid., 432.

[66] Ibid., 433. In order fully to appreciate the decision and the language in which it is rendered, it is necessary to know something of the man who delivered the opinion. Justice Holmes, the writer of the most beautiful prose in the Supreme Court decisions, can nearly always be relied upon to produce at least one rhetorical gem in each decision; his interpretation of law may be another question. The following citations from opinions delivered by him are illustrative and instructive. It is realized that it is not quite fair to isolate statements from their context, but it is submitted that no context can justify all of them. The Justice is at his best—or worst—where problems of 'sovereignty' are concerned. In denying a right of action for damages suffered from acts done in another sovereignty by aid of that sovereignty's military force, he said: "The fundamental reason is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . . . The very meaning of sovereignty is that the decree of the sovereign makes law" (American Banana Co. v. United Fruit Co., 213 U. S. 347, 358, 53 L. Ed. 826). But "when theory is left on one side, sovereignty is a question of strength, and may vary in degree" (Carino v. Insular Government of Philippine Islands, 212 U. S. 450, 458, 53 L. Ed. 596). Though we may be generous in interpreting the attributes of sovereignty, "we must be cautions about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. . . ." (Noble State Bank v. Haskell, 219 U. S. 104, 110, 55 L. Ed. 112). "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular mo-

It is submitted that the ghost-seeing proclivities of Mr. Justice Field are more consonant with an enlightened jurisprudence than the results obtained by "weighing imponderables." [67]

The treating of the vessel itself as a wrongdoer is a fiction, says Holmes, which it cannot be supposed the government intends to apply to itself. The *Siren* is explained as a case where the United States came into court to enforce a claim, when it would be assumed to summit claims in regard to the same subject matter.[68] These claims were ethical only, "but recognized in the interest of justice when the sovereign came into court." [69] But by what right did the admiralty court assume to allow merely equitable claims to be asserted, and that against the objection of the United States? If in the *Western Maid* there was no legal tort, then in the *Siren* there was no legal claim; apparently Justice Field was a better spiritualistic medium than Holmes, and had greater success at materializing ghosts.

The decision was a five to three one. McKenna delivered one of the most heated dissenting opinions in the history of the court. He pointed out that the distinctive feature of American admiralty practice had been the holding of the ship as the wrongdoer. The opinion actually rendered in

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tions" (Southern Pacific Co. v. Jensen, 244 U. S. 205, 221, 61 L. Ed. 1086). When it is necessary, to prevent recovery of a claim against the government by an officer, "imponderables have weight" (U. S. Grain Corp. v. Phillips, 43 S. Ct. 283, 67 L. Ed. 552). However, "I know that when common understanding and practice have established a way, it is a waste of time to wander in bypaths of logic" (Ruddy v. Rossi, 248 U. S. 104, 63 L. Ed. 148). In the *Western Maid*, such loitering was more than a waste of time.

[67] See note 66.

[68] Why the government should be *supposed* to desire that a fiction invented to promote justice should not be applied to it, but should be *assumed* to submit to claims that were not of a legal nature, is a problem only the learned justice can solve.

[69] 257 U. S. 434. The courts had consistently recognized the existence of a right without a remedy. See cases cited, note 58; Cooley on Torts, p. 122. Justice McLean in 1839 had recognized the distinction. "It is true, the payment of a debt cannot be enforced against the government by suit, but claims against it are none the less legal or equitable on that account" (Heirs of Emerson v. Hall, 13 Pet. 409, 412, 10 L. Ed. 223).

the *Siren,* and pointed out in the dissent of that case, was that "by becoming the actor the United States . . . waived their exemption from direct suit and opened 'to consideration all claims and equities in regard to the property libelled,' not, of course, that the waiver of exemption created the 'claims or equities.'" [70] Continuing, he said:

> I reject absolutely that because the government is exempt from suit, that it cannot be accused of fault. Accountability for the wrong is one thing, the wrong another.[71]
>
> The cases at bar would seem to be cases for the application of the maxim of stare decisis, which ought to have force enough to resist a change based on finesse of reasoning, and attracted by the possible accomplishment of a theoretical correctness.[72]

The case drew immediate and adverse comment.[73] Of these, one is worthy of quotation. Its author considered the Ethiopian gentleman concealed in the judicial woodpile consisted in the fact that the United States had a large fleet of merchant vessels, part of which it had chartered and was contractually obligated to redeliver free of liens, part of which it owned and wished to sell free from liens.[74] Speaking of the decision, he says:

> The holding which disposed of the case may be put thus: if there is no right to sue for tort, there is no tort. This is not a maritime question at all; but it disposes of an admiralty cause by refining on the meaning of a word unknown to the historic admiralty. . . . The word that is known to admiralty is collision; so that perhaps, in defiance of syllogistic canons, the bar will state the rule of the *Western Maid* thus: 'The United States has not consented to be sued for collisions; therefore in a legal sense, there was no collision.' The Bumbles of the shipping world will pass the usual comment on this rule. . . .[75]

A recent opinion by Holmes seems plainly inconsistent with the ratio in the *Western Maid.* The Steamship *Luckenbach* libelled the *Thekla,* which put in a motion for a stay until

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[70] 257 U. S. 437.
[71] Ibid.
[72] 257 U. S. 441.
[73] 31 Yale Law Journal 879; 20 Michigan Law Review 533; 10 California Law Review, 333; 17 Illinois Law Review 57 (approves); 37 Harvard Law Review 529.
[74] Charles M. Hough, Admiralty Jurisdiction of Late Years, 37 Harv. L. Rev. 529, 542.
[75] Ibid., 543-544.

security for its own cross-libel was given. This was granted. Thereafter the United States intervened, was made a party libellant, and "stood on the Steamship Company's (*Luckenbach*) libel." The United States filed a claim without submitting to the jurisdiction, alleging ownership and possession of the *Luckenbach*. The Emergency Fleet Corporation filed a stipulation, reciting that the *Luckenbach* was in the possession of the United States at the time of the collision, and the liability, if any, was that of the United States acting through the Corporation. Later the owners of the *Luckenbach* excepted to the jurisdiction of the court on the ground that the vessel was under charter to the United States, manned by naval officers and crew, and used for war purposes. The *Luckenbach* was found to be solely at fault.

The government relied on the *Western Maid;* the collision inflicted no legal wrong; there was no claim to be asserted against the United States, and hence there could be no counterclaim. It will be noted that while the United States can be considered the actor here, the right of the *Thekla* would apparently be weaker than in the case of the *Siren.* Here the United States proceeded against the *Thekla;* the cross-libel was filed, not for any claim that attached to the *Thekla,* but against the *Luckenbach,* the government operated ship. All the *Siren* had allowed was the assertion of a claim against the very property which was the subject of governmental action; this was a different suit, against another vessel.

Holmes refused to qualify the decision in the *Western Maid,* but supported the cross-libel. The United States coming into court to assert a claim allowed justice to be done "with regard to the subject-matter." The absence of legal liability did "not destroy the justice of the claim"; "the moral right of the claimant is recognized." "The subject-matter is the collision, rather than the vessel first libelled." This is exactly the position that was denied in the *Western Maid,* where the judge spoke of "tort" instead of "collision."

. . . the reasons that have prevailed against creating a govern-

ment liability in tort do not apply to a case like this, and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.[76]

Although the court refused to overrule the *Western Maid,* very recent [77] legislation has operated practically as a recall of that decision; at the present time Americans and those nationals whose governments allow similar suits, are protected to exactly the same extent whether the injury be done by a public ship of *any* character owned by the United States, or by a privately owned vessel. The only distinction is that proceedings against the United States are in personam only.

By the provisions of the Public Vessels Act, a libel in personam may be brought against the United States, or a petition impleading the United States, for damage caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a vessel of the United States.[78] The Act applies to actions arising after April 6, 1920.[79] Suits may be brought in the district where the vessel is found, or if outside the territory of the United States, in the district where any of the parties suing reside or have their office; or if they do not reside or have an office in the United States, then in any district.[80]

If the United States files a libel for damage done by a private vessel, the owner may file a cross-libel, set-off, or counterclaim for damages arising from the same transaction.[81] No officer or member of such public vessel can be subpoenaed without consent of the proper officer.[82] Foreign subjects are allowed the privileges of the Act if their government allows nationals of the United States similar rights.[83]

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[76] Luckenbach S. S. Co. v. The *Thekla,* 69 L. Ed. (Adv. op.) 126, Oct. Term, 1924.

[77] The Act was passed after this chapter was prepared.

[78] Public Vessels Act, March 3, 1925, s. 1, 1925 A. M. C. 631.

[79] Ibid.

[80] Ibid., s. 2.

[81] Ibid., s. 3.

[82] Ibid., s. 4.

[83] Ibid., s. 5.

The Attorney-General may arbitrate, compromise or settle claims under the Act,[84] judgments or settlements to be paid out of money in the Treasury appropriated therefor.[85] The United States is to have the benefit of exemptions and limited liability allowed owners, charterers, operators or agents of private vessels.[86] "Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States." [87]

The subjection of the very instrumentalities of government, not merely its trading paraphernalia—for surely a warship is a "public vessel"—seems a rather practical answer to immunity based on "inexpediency or public policy." If to the negligence of highly efficient naval commanders can be applied the doctrine of respondeat superior, it is not beyond the realms of possibility that some day the State through its government will admit liability for the tortious acts of all its officers, committed within the course of their normal actions in carrying on the affairs of government.

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[84] Ibid., s. 6.
[85] Ibid., s. 7.
[86] Ibid., s. 9.
[87] Ibid., s. 8.

CHAPTER X

Administrative Law and State Responsibility in France[1]

It is probable that the French citizen is more adequately protected against the State, acting through its administrative organs, than is the inhabitant of any other country. This is due primarily to the jurisprudence evolved by the Council of State, especially since 1872. The French citizen has, ordinarily, two safeguards against the Acts of the Administration; he may institute an action to have such acts annulled, after their promulgation, (recours pour exces de pouvoir), or if the executed act injures him, he has his action against the State, or at least the actual wrongdoer (recours contentieux).[2]

[1] France has been chosen as representative of the Continental as opposed to the Anglo-American system of administrative law and state responsibility. French theorists have given more careful attention and consideration to these topics than have those of any other Continental country; their theories have been worked out with greater particularity. France would therefore be the natural starting point for any investigation of the Continental system; a consideration of the other European countries would consist primarily in noting their approximation to, or deviation from, the standard. The chief differences that would be observed in a study or comparison of all the Continental countries would be, first, the degree of responsibility assumed by the State for the acts of the administration—which varies from a high degree in France and Germany to a much more restricted area in, say, Austria; and second, the system of tribunals in which administrative responsibility is enforced. In France, Italy and Austria, for example, there are separate administrative tribunals, and a tribunal of conflicts to decide controversies between the administrative and ordinary jurisdictions; in other countries, as Norway, Sweden and Denmark, the ordinary judicial bodies exercise a separate and distinct function, controlling the administration by adjusting claims against it, but recognizing the independence of the Administration by refusing to annul any of its acts. For a very good brief account of the various systems, and an exhaustive bibliography, see Borchard, The Diplomatic Protection of Citizens Abroad, p. 118, s. 49 ff.

[2] Articles in English—James W. Garner, Judicial Control of Administrative Acts in France, 60 American Political Science Review, 637; and French Administrative Law, Yale Law Journal, April 1924, p. 597; Borchard, op. cit., 116 ff.; Frederick P. Walton, The

Annulment of Illegal Acts.—There is also available an indirect control of the acts of the Administration through the ordinary judicial tribunals that should be mentioned. Article 471, section 15 of the Penal Code provides that "those found guilty of violating ordinances (règlements) legally made by the administrative authority, shall be punished by a fine. . . ." The judicial tribunals have considered this an authorization to determine for themselves if an ordinance alleged to have been violated has in fact been legally made; whether it conforms to the constitution and laws and has been issued by a competent administrative authority. If found to be illegal, the court will sustain an "exception of illegality" and refuse to impose the fine.[3]

If, however, an administrative order is considered for any reason to be illegal, the French citizen need not wait until he has broken its provisions and then plead the invalidity of the order by way of defense. He may by a cheap and efficient process apply to the Council of State to have the order reviewed and its legality tested; if found to be illegal, the order will be annulled. The Council has assumed this power only recently, for at first it was merely an advisory body.

During the Revolutionary period, Montesquieu's theory of the separation of powers was applied to prevent the ordinary courts from dealing with matters not purely of civil law; matters even of a controversial, litigious nature were denied to them if such matters concerned the Administration. The judicial courts had cognizance only of disputes between private individuals. At the same time a separate system of administrative jurisdictions was created.[4] The foundation

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French Administrative Courts, Illinois Law Review, Nov. 1918, p. 63; Joseph Barthélemy, The Government of France, 181 ff. (trans.); Léon Duguit, The French Administrative Courts, 29 Political Science Quarterly, 402 (trans.).

[3] Garner, Judicial Control of Administrative and Legislative Acts in France, 60 Am. Pol. Sci. Rev. 638.

[4] Léon Duguit, The French Administrative Courts, 29 Pol. Sci. Quar. 386-388.

of these separate jurisdictions represented a privilege obtained by the Administration for its own advantage.[5]

In the year VII the Council of State was created to give advice to the Head of the State; to aid him in determining if an act complained of by an individual was of such a character that the officer committing the act should be subjected to the judicial tribunals, or if the matter were of a nature to be dealt with by the administrative authorities alone.[6]

By the Act of May 24, 1872, the Council of State was reorganized and given really judicial qualities; the power to render decisions, not merely to give advice. "The Council of State renders final decision in administrative controversies and upon all suits to annul for excess of power the acts of the various administrative authorities."[7]

Before we can consider, then, what is a proper case for the recourse for annulment, it is necessary to determine what is an "administrative controversy," for over such class of cases alone is the Council of State given power. At first a distinction was drawn between acts of government and acts of administration.[8] These acts of government correspond roughly to what we would call "political" acts; they were expressions of the "puissance publique," and were withdrawn from the cognizance of the administrative courts. The distinction between the two classes of acts has been vigorously attacked,[9] with the result that the number of acts considered outside the administrative jurisdiction has been greatly reduced. These "political" acts may now be grouped into a very few classes; all others are considered administrative, and may be attacked before the Council of State.

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[5] Barthélemy, The Government of France, 181.

[6] Jèze, Eléménts du Droit Public et Administratif, 1910, p. 90.

[7] Duguit, 29 Pol. Sci. Quar. 391.

[8] Tirard, La Responsabilité de la Puissance Publique.

[9] Brémond, Des Actes de Gouvernement, 6 Revue de Droit Public, 37 ff. He considers that the word "administrative" was used in its popular meaning in the act, as including all executive as opposed to legislative functions.

The following are considered acts over which the courts, judicial and administrative, have no control:

1. General legislative acts, which establish an impersonal rule of law, applicable to all citizens alike.

2. Parliamentary acts, such as declaring a state of siege; ratifying gifts to religious bodies.

3. Judicial acts.

4. Actes de gouvernement, those which by their very nature require the application of distinct principles, different from those applicable to ordinary acts. In reality, "governmental acts are those which have been held by the administrative courts to have that character." They are probably now limited to:

a. The relations of the legislative and executive branches of government; convocation and dissolution of the Chambers; the promulgation of laws.

b. Acts over which Parliament has retained express control; as the customs.

c. Foreign relations.[10]

Apart from these, all acts, whether of the most insignificant administrative agent or of the President himself, are subject to annulment by the administrative courts. The subjection of the administrative orders of the President is a matter of recent origin and growth, and is illustrative of the tendency to bring every act possible within the category of those attackable by the citizen. Before 1845 there was no recourse against the acts of the Head of the State; then from 1845 to 1872 all his acts, except those of "public administration" (règlements d'administration publique) could be annulled. Finally, in a case in 1907, it was recognized that even such ordinances of the President could be attacked. The President had changed the regulations applicable to the Railroads in such a manner as to subject them to many additional charges and to render their duties more onerous.

[10] Condensed from Tirard, 150-153.

On petition of the railroads, the Council of State entertained a petition to set aside this decree as an excess of power.[11]

Any aggrieved person may attack any administrative act before the Council of State within two months after the act has been promulgated. The only formality is that the complaint shall be enrolled on special taxed paper, the cost of which will be returned to the petitioner if his appeal is admitted; credit is given, the petitioner being charged with costs only if his appeal fails, and even then eighty francs is the maximum to which the costs may amount.[12] The complainant must have some interest at stake, although it is sufficient if this interest is simply a moral[13] one; but it must be of such a character that the complainant has no other direct, complete and adequate remedy. If the illegality of the act complained of is established, the Council annuls the act itself; not merely its effect upon the complainant; but this annulment is all that the Council will do in the one action. If the complainant desires damages for the effect of the act if already executed he must bring a separate action.[14]

Repeal for Excess of Power.—An act may be annulled for an "excess of power"; the construction of this phrase has been very liberal in recognition of the remedial nature of the statute. It includes an appeal based on incompetence, violation of form, violation of a law, or an abuse (détournement) of power.[15]

The act may be attacked on the ground of incompetence; either of the administrative officer issuing the order, or of the subject-matter of the order itself. The ordinance of a mayor was annulled because it was of a character that only a prefect could issue; the act of a municipal council providing for a town physician was quashed as an illegal en-

[11] Jèze, 25 R. D. P. 38, 41-42.

[12] Barthélemy, op. cit., 189.

[13] The interest that any good citizen would have in keeping the Administration within its proper grounds would suffice (Garner, 60 Pol. Sci. Rev. 643).

[14] Jèze, Eléments, p. 90 ff.

[15] Hauriou, Droit Administratif et Droit Public 7 ed. 427, 448-458.

croachment in the sphere of private affairs. An order is equally defective if it fails to comply with the prescribed formalities, whether the failure be substantial, or merely technical.

If the order violates a rule of positive law or any obligatory administrative regulation, it may be annulled. It was on this ground that the use of a text book alleged to contravene the "religious neutrality" imposed by law, was sought to be forbidden.[16] Again, a mayor, after the separation of church and state, ordered the church bells rung for the civil funeral of a suicide. By law he was authorized to have them rung only for religious purposes, except in cases of common danger, or in exceptions provided for by laws or local customs, in none of which classes did this act belong. The Council of State annulled the order.[17]

The most important class, and one that really marks a most enlightened attitude, is the recourse based on an abuse of power. The officer may have the fullest power to do the act; he may comply with all the formalities and violate no rule of positive law, yet if the purpose of his action is improper, the act may be annulled. The Council of State requires not only a proper outward observance of the proprieties, but a proper motive as well. The court will reject an "act of an agent of the Administration who, in doing an act within his competence, and following the prescribed forms, uses his power toward an end and from motives other than those in view of which this power has been given him, that is to say, from motives which are not those of good administration, which are condemned by administrative morality." [18]

Examples are particularly frequent of the abuse of the police power; attempts to use it to aid local commerce, the business of private individuals, and as adjuncts of political parties, all have been annulled.[19] The Government ordered

[16] Cons. d'Etat, 14 jan. 1916, Association des familles de Ganarde-les-Bains, 33 R. D. P. 52, 54-55.

[17] Abbé Bruant, Sirey, Recueil des Arrêts, 1910, 3, 132 (C. E.). This case could perhaps be included in the next classification.

[18] Hauriou, op. cit. 450. [19] Ibid.

the dissolution of a municipal council, an action proper only for the correction of the conduct of the communal administration. Really this action was to punish the conduct of certain elections in which the government had suffered; the dissolution was annulled. A decision of the Minister of War was quashed for excluding from bidding for supplies a dealer who held political and religious beliefs of which the minister disapproved. If the exclusion had been because the merchant was not a responsible person the minister would have been within his power; his improper motive rendered the act invalid.[20] The act, then, may be annulled whenever the actor uses his authority for a purpose for which it was not intended.

The prefect may order a match factory to be closed—"because of insanitary conditions" he says—quite legally. The State Council finds out, however, that the real motive is to save the State from paying the legal compensation provided for in the match monopoly act, and accordingly annuls the decision; or a mayor, again on the ground of unsanitary conditions, orders the closing of a cattle market; the State Council devines that the intention of the mayor is to force dealers to go to the newly built municipal cattle market, and to conduct their business there; other authorities make use of rights which the law has given them for personal interest, or moved by political passion; and in every case the State Council pronounces annulment where it finds a misuse or conversion of power. No judicial authority would venture to extend its investigations as far as this.[21]

It protects landed property against encroachments which the administration might be tempted to make by way of extending the limits of public land. It defends commercial liberty against every kind of police abuse. In the hands of either the individuals concerned, or of unions of civil servants it becomes one of the principal weapons against favoritism and arbitrary choice in public offices of every class and rank. The famous writer, Pierre Loti, a naval officer, was unjustly retired from service; he got this decision annulled and reëntered the service with a higher rank than before. A corporal was reduced to the ranks, and had this degrading sentence annulled on the score of illegal procedure. A prefect was dismissed on account of false evidence concerning his conduct during invasion; but his dossier was not communicated to him, and his dismissal was consequently annulled.[22]

The French citizen is thus as amply protected from the continuation of illegal decrees as it is possible to provide

[20] Duguit, 29 Pol. Sci. Quar. 398-399.
[21] Barthélemy, op. cit., 188-189.
[22] Ibid., 189-190.

through the instrumentality of court action. The question still remains as to his protection, or remedies, where injury has been suffered from the act of the administration, or of those in its employ. As we have seen, Anglo-American jurisprudence has in general denied responsibility for injuries caused by the "legal" operations of the State even when engaged in ordinary trade; where the administration has functioned faultily, or acted "illegally," the act is said to be that of the officer, regardless of his bona fides; and the illusory remedy of a civil suit against the officer is given the aggrieved person.

Acts of Private Gestion.—In France, we remove one of these difficulties immediately. Where the State, through the Administration, operates industrial monopolies, becomes an ordinary trader, possesses property not directly devoted to the public service, but only indirectly, as through revenue derived from it—where the act is one of "private gestion"—the state is subject to the common law as administered by the judicial tribunals. In the operation of its tobacco and spirits monopolies, of forests and pastures, in every case where the public domain and the public service are not directly concerned, the state buys, sells, leases, borrows on just the same conditions and with no other privileges than the citizen who engages in similar pursuits.[23] Trading is not necessarily a sovereign function; it should not, if justifiable on economic grounds, need sovereign immunities.

The carrying on of the Administration involves many injuries to individuals. Some of these injuries are practically inevitable, and accompany even the normal functioning of the service, just as the operation of an industrial enterprise is invariably accompanied by a sequence of accidents. Other injuries may be the result of the faulty operation of the service; these faults may be from defective organization and supervision, from the defects to be expected from any project

[23] Hauriou, op. cit., 84-88, 916; Jèze, Eléménts, 165-167; Borchard, op. cit., 135.

carried on by fallible humans; or they may be purely personal to the author, unconnected in any way with his official position or the carrying on of his work.

Admitting that the State can and should be liable under certain conditions for injuries caused by its Administration, the question naturally arises as to which of the above conditions, if any, should give rise to this responsibility. Here again, even if the desirability of holding the state to the highest degree of responsibility be admitted, there is a grave problem to be solved. If the State is made responsible for all the acts of its employees, if it is made an universal insurer, then though the individual injured may have complete redress, the public servants, freed from personal responsibility, will become a privileged class, among whom prudence will be unknown. If, however, the public servants are held to a high degree of accountability even when they are acting according to what they believe to be the good of the service, the Administration will be greatly hampered; no financially responsible person will care to serve in it, and those who do will be afraid to act.

At first a distinction was drawn between acts of the Administration that ordered, commanded, required something to be done, and those that concerned merely the operation of the ordinary services. The former—actes d'autorité—were considered as partaking of the nature of sovereign acts, and for them the State incurred no responsibility; for the latter it did. Apart from the vagueness of the line that distinguished the two types of acts, there was grave question of the desirability or possibility of supporting any such distinction. By the beginning of the twentieth century the courts, influenced by the texts writers, and especially by the arguments of M. Hauriou, had abandoned this classification.[24]

Faute de Service and Faute Personnelle.—The courts still recognize the field of legislative or political acts, for which

[24] Pierre Cot, La Responsabilité Civile des Fonctionnaires Publics, Thèse, Paris, 1922, p. 237.

the State accepts no responsibility, but apart from these, that is, in all administrative acts, the distinction of sovereign and non-sovereign acts has been abandoned. Instead, the responsibility of the State has been recognized, generally, for faults of service, or operation of the public services, but not for the acts of the individuals in the service when such acts are purely personal and detachable from their functions. For a faute de service, responsibility is recognized; for a faute personnelle, usually the individual alone is liable, and before the judicial courts. In this manner the courts have sought to reconcile the conflicting requirements of freedom of administrative action, and control of the actors by personal accountability. This is generally true, but the tendency more and more is to hold the State ultimately responsible where primary action against the individual would be ineffective to afford redress.

Laferrière defines the two classes of acts as follows: "The first (faute de service) results from a service badly rendered, an order badly done, misunderstood, imprudently executed, but still having in view the functioning of the service alone; the second consists of crimes, frauds, grave faults where appear the personal passions of the agent, rather than the difficulties and risks of the function." [25] The first are considered as having been committed by the state itself, as a result of defective organization or supervision of its agencies; the State alone is responsible, and may be prosecuted before the administrative courts. For the second class, the actual perpetrators alone are responsible, and may be held liable in an ordinary civil action before the judicial tribunals. In the first class "it is not the functionary who has been directly responsible; it is the act considered, in itself, which has been made responsible." [26]

Faute de Service.—Three theories or criteria of responsibility for faults of service have been evolved; three of the "personal fault." The Administration may be responsible

[25] Laferrière, Droit Administratif Français, 1896, 2 ed. ii, 189.
[26] Hauriou, op. cit., 99.

because of an irregular functioning of the public service—the administrative machine has not been properly organized or supervised.[27] An act then, which is the result of a personal fault, of the intervention of the act of a third party, or the result of force majeure, would not constitute part of the service and would not entail responsibility. The second theory is quite similar, although here the administration is considered as personified, and administrative faults are faults of will—there must be fault, imprudence or negligence by the agents forming the service. Under this second theory an active error is necessary to entail responsibility; for instance, one whose house was destroyed by a change in a road bed would have no compensation unless the road was run through the house as a result of an error in planning.

The third theory of responsibility is strictly speaking not one of fault at all. The administration is responsible for the inherent risks of the service regardless of fault; it is the fact (fait) not the fault (faute) of service that engenders liability. The idea is that of equality of sacrifice; that the expenses of a service performed for the benefit of all should be equally borne by all—a sort of glorified general average of admiralty jurisprudence. It is recognized that even the most perfect organization will inevitably work injury to certain individuals merely because the service is performed, and entirely apart from any volitional action or any real fault. Where a disproportionate burden has been placed on one person by the operation of public services, he should be compensated. As Larnaude expressed it:

> When this vast machine, called the state, a hundred times more powerful and a hundred times more dangerous than the machinery of industry, has injured some one, those in whose interest it was functioning when the injury was caused, must make restitution; the principles of solidarity and mutuality upon which our institutions are based, require it.[28]

It is apparently toward this view, responsibility without fault, that the administrative tribunals are tending. The

[27] Classifications from Tirard, op. cit. 193-216.
[28] Quot. by Tirard, p. 199.

same idea is noticeable in private law in workmen's compensation acts, and unemployment insurance. The idea of fault is disappearing; that of social risk, of the responsibility of society for injuries resulting from even the best social organization, has become dominant; these risks are considered as a cost of production in industry, and are becoming the price of existence in society.[29]

Faute personnelle.—Three doctrines of personal fault have been evolved.[30] Laferrière would find a faute personnelle, for which the individual alone is responsible, whenever the act done is a manifestation of an evil intention of the actor; when it reveals the human weaknesses and passions, not the functioning of the service. Hauriou would trace it to a faute lourde; an act detachable from the service; a failure to conform to the ordinary standards of the profession. Duguit would look to the end pursued; if the functionary was striving to advance the end or aim of the State, he is not liable; if he yielded to some other motivating influence, he is personally liable. All of these recognize the obvious fact that the Administration, the State, can act only through human agents; that these agents can act in two distinct capacities; first, as officers attempting to forward the interest of the service, in which, though still fallible and human, the purpose, the motive, is a justification as regards third parties, and entails the responsibility of the State alone; second, they may divorce themselves from their position, and act as ordinary individuals, seeking their own ends, and using their

[29] This insurance, as applied to State action, is generally limited to special injury; it does not apply to a situation where all are equally affected, as by a general law, or the expense assessed for an improvement. If the improvement caused a particular burden to one, that person would be indemnified to the extent his burden exceeded that of his neighbors. This is well exemplified in the public work, where compensation is awarded if the injury results from a fault of the agents, unjust enrichment (expropriation, requisition), or entails an unusual sacrifice (Jèze, Eléménts, 98-99).

[30] Dupeyroux, Faute Personnelle et Faute du Service Public, Paris, 1922, 64-78; Cot, op. cit. 130-151.

position solely for private purposes—here the individual personality shines through, and the individual is responsible.[31]

It is difficult to say just what principles have been adopted; when the French courts will consider the act one personal to the agent, and when it will be the act of the administrative service, or now, perhaps, will have both characteristics; it is doubly difficult to attempt a rigid definition when it is probable the courts themselves have adopted none. The theory, and indeed the practice, is to consider each case on its merits, and although weight is given to preceding decisions on similar questions, the weight is given to the reasoning employed, not the decision itself. The courts have not been bound by precedent, and on several occasions have adopted entirely inconsistent views. The present trend is to narrow the irresponsibility of the state and to allow actions against it that some years ago were refused. The courts react, and are not ashamed to react, to changing economic conditions; the State as a trader is a different creature from the juristic State, and is made subject to different laws; there is no attempt to create an absolute jurisprudence in a world of relativity.

> The responsibility which attaches to the State by reason of the faults of its agents, say numerous decisions of the Council of State and the Tribunal of Conflicts, cannot be regulated by the principles which are established in the civil code for the relation of individuals to individuals; this responsibility is neither general nor absolute; it has its special rules which vary according to the needs of the service and the necessity of harmonizing the rights of the State with personal rights.[32]

If the Tribunal of Conflicts refuses to announce hard and fast rules of administrative law,[33] the writer will certainly not attempt any such task. It is hoped, however, that the citation of a few of the leading cases will demonstrate the

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[31] The early tendency was to hold the individual alone responsible for a faute lourde, a very gross mistake in his powers, even though apparently connected with his function. The tendency is now decidedly the other way.

[32] Laferrière, op. cit. ii, 183.

[33] Blanco, Dalloz, Jurisprudence General, 1873, 3, 20; Sirey 1873, 2, 153.

general tendencies in the French law of the relation of administrative servants to individuals, of the administration to the same, and of the servants to the Administration.

Soon after the Act of 1872, making the Council of State a court and not an advisory body,[34] a case arose that clearly indicated the separate functions of the judicial and administrative courts. A wagon loaded with tobacco, and belonging to the government factory at Bordeaux, knocked down and killed a little girl. The father prosecuted the driver and the State in the same action as jointly responsible for the death caused by their fault. Conflict being raised, the Tribunal of Conflicts decided the judicial courts had jurisdiction over the action against the driver; the Council of State declared the State was also liable before the administrative courts. This responsibility for the damage done by individuals in its service did not arise from the provisions of the Civil Code,[35] but from the necessity of harmonizing the conflicting rights of citizen and State.[36]

The civil courts alone have jurisdiction if the fault is a faute personnelle; the procedure is a simple action in damages according to the ordinary principles of private law. The theory of the personal fault is thus really a matter of jurisdiction, and was introduced to determine which set of courts should take cognizance of the act. Where the civil courts were competent, it was a maxim that the Administration was freed from liability—"jamais du cumul"—but now, as will be shown, the same act may cause administrative and personal liability. The judicial tribunals are entrusted with the pre-

[34] The Council of State has no direct means of enforcing its decisions; but its judgments of indemnity are always paid, and though occasionally its annulments have been disregarded, it can nearly always bring into play disciplinary measures that correct the difficulty. One disobeying its orders could probably be prosecuted before the judicial tribunals. Cf. Duguit, Law in the Modern State, p. 192 ff.

[35] Arts. 1382-1384 render the individual responsible for any damage caused by his fault, negligence or imprudence, or that of one in his employ, and for things in his custody (sous sa garde).

[36] Blanco, Dalloz, 1873, 3, 20; Sirey 1873, 2, 153.

servation of personal liberty, so they alone have jurisdiction over a suit for false arrests.[37]

Agents of the sanitary police attributed to a passenger on a vessel a contagious disease from which she was not in fact suffering. They ordered her incarcerated in the port hospital, where, through lack of proper care, she died. She was buried without proper precautions having been taken to see if she were really dead. The Tribunal of Conflicts considered this action so outrageous that it confined action to the judicial tribunals alone, refusing to hold the State responsible for such gross inefficiency.[38] Again, an instructor in the public schools made insulting remarks about the army, religion, and God. This was considered a faute lourde "detached from his position as instructor"; the civil tribunals had jurisdiction.[39] A mayor ordered church bells rung for civil funeral services; his power did not extend to such an order, which apparently was a deliberate affront to Catholics. The Tribunal of Conflicts considered that "such an act has the character of an administrative act only when it can be connected with one of the circumstances definitely enumerated" in which he had power. Here it was a "personal act" of which the judicial tribunals alone had jurisdiction to award damages, and against the mayor alone.[40] But in an exactly similar case, the Council of State entertained an appeal to annul such an act as an excess of power.[41]

These cases are old as French administrative cases go; on similar lines of cases M. Jèze was able in 1909 to formulate a rule as to when an act was a fault personnelle, revealing "the personality of the agent, with its weakness and errors," cognizable *only* in the judicial tribunals. The act is the

[37] Favre, Cour de Lyon, Dalloz, 1904, 2, 321.
[38] Mascaras, Sirey, 1905, 3, 15.
[39] Morizot, Sirey, 1908, 3, 81.
[40] Abbé Pirment, Sirey, 1910, 3, 129.
[41] Abbé Bruant, Sirey, 1910, 3, 132. As Hauriou points out in a note to the last two cases, the same act is non-administrative and administrative at the same time; an attempt to subject the acts of all aministrative officers to administrative supervision, even if the administration is not liable in damages.

personal fault of the agent, he said,[42] when it discloses a malicious intent, or is a "gross" fault (faute lourde). It is a gross fault when the agent clearly mistakes his legal powers, and does an act resulting not merely in excess, but in abuse of power; when he grossly mistakes the facts which induced his conduct, and from which the fault arose (Mascaras case), or when he has violated a penal law. Yet the next year, Jèze confesses that the progress of decisions has been such that even in such cases of faute lourde it seems that the State also would be liable.[43] He recognizes that the restriction of the consequences of a faute lourde to an action in the judicial tribunals is undesirable. "It is unjust to say that the graver the fault, the smaller are the chances of obtaining a pecuniary recompense. Without doubt, in case of gross faults the victim can sue the agent, but the latter may be insolvent; it is better for the victim to have the Treasury his debtor." [44] The later decisions have recognized the justice of this reasoning.[45]

Police Functions.—Turning now to the jurisprudence of the Council of State, we find an interesting and rapid progress in the idea of the social risk. At first the Council refused to hold the administration responsible for an "act of authority," especially in regard to the police function. A citizen had been nearly blinded by the wadding of a gun fired by some itinerants, licensed to give exhibitions on the

[42] Rule of Hierarchy, R. D. P. 1909, p. 271.
[43] Jèze, Eléménts, 103.
[44] Ibid.
[45] See also Eléménts, 109, 110. Walton in his article (Ill. L. Rev. Oct. 1918, p. 63), has taken these three illustrations above cited, as typical, and has used them as a basis for comparison with the "rule of law" much to the advantage of the latter. Of Walton's article the present writer has two criticisms. First, Walton takes three exceptional cases, and assuming them to be typical, he condemns the system. Second, he accepts the idea of State responsibility in general, which is rejected in England and America, and condemns the French system because it does not make this responsibility applicable to every act of every administrative agent. It is not improbable that this may come in the course of time; but even if it does not, partial responsibility of the State seems preferable to none at all.

public streets. He claimed the accident was the result of careless and inefficient police supervision. Said the Court:

> It is a principle that the State is not, as regards the "puissance publique," and especially in matters pertaining to police service, responsible for the negligence of its servants; that consequently, even admitting that M. Lepreux (the one injured) can show a personal fault by the agents who were charged with maintaining the safety of the public highway, he cannot maintain that the State should be declared pecuniarily responsible.[46]

This ruling was vigorously criticized in a note by M. Hauriou, which produced a reversal of attitude by the court five years later, in the famous Grecco case.[47] A bull had escaped in a village in Tunis and was being pursued by a large number of citizens and gendarmes who kept up a brisk fire. A bullet hit Grecco, who claimed that it had been fired by a gendarme, and that the wound was the result of an act of the police service. Instead of rejecting the plea on the ground that the state was not responsible for the police administration, the court refused it for insufficiency of proof that a gendarme had fired the bullet. ". . . the evidence does not show that the shot which hit M. Grecco was fired by the gendarme M., nor that the accident, of which the plaintiff was the victim, could be attributed to a fault in the public service."

The liability of the state for faulty functioning of the police service is now well recognized. One Pluchard was knocked down by a police officer pursuing a thief. Pluchard's leg was broken, and he was permanently injured, resulting in a diminution of his earning capacity, for which he sought compensation. The Minister of the Interior had refused relief, saying the accident had been the result of the maladroitness of the officer, who could be held before the judicial tribunals. The Council of State awarded an indemnity, considering this a fault of the public service.[48]

A most interesting case rose in Guiana, in connection with

[46] Lepreux, Sirey, 1900, 3, 1.
[47] Sirey, 1905, 3, 113.
[48] Pluchard, Cons. d'Etat, 24 dec. 1909, 27 R. D. P. 83-86.

the conduct of a convict camp. Two convicts escaped, and some time later killed a native. In the course of the trial of the suit for compensation, it was alleged and proved that the prison authorities had been notified of the place where the escaped convicts were hiding, as well as of certain accomplices who supplied them with guns. The Council of State allowed an indemnity. The state was liable, not merely because of the escape, which did not create a "faute de service," for no measures could absolutely prevent all escapes, but because in addition no attempt had been made to exercise any watch over the place where the convicts openly lived, and of which the authorities were advised. Despite the recognized difficulties of policing the district, there had been a "manifest and particularly grave fault" in management.[49] In another case where an attack by escaped convicts had been made on the same day as the escape, and there were no allegations or proof of particular acts of negligence, the suit was dismissed.[50] Perfection is not exacted in the police administration; there must be shown some particular act of negligence, to which the citizen in the normal and reasonable working of the service would not be exposed.

Public Works.—It has been in the field of injuries caused by the public works, or the public service, that the Council has been most liberal. The theory is that such enterprises, of whatever character they may be, before benefiting the community should spread the costs equally among all. Those who have been injured in any way should be indemnified, as well as those whose property has been expropriated.[51] The Tribunal of Conflicts has recognized that this responsibility for the correct execution of a public service, or a public work, is applicable to the departments and communes as well as the state. A madman had escaped from an asylum, the maintenance of which was a duty of the Department. After

[49] Sinais, Cons. d'Etat. 4 jan. 1918, 35 R. D. P. 404-405; note by Jèze.

[50] Duchesne, Cons. d'Etat, 4 jan. 1918, 25 R. D. P. 405-406.

[51] Hauriou, op. cit. 157.

his escape, the madman burned the property of the petitioner. The facts showed that the escape had been caused by a failure to use reasonable care in the conduct of the asylum. The government commissioner [52] could see no reason why the administrative rules applicable to the state should not be applied to its subdivisions. Neither could the Tribunal, so the jurisdiction of the administrative court was sustained.[53]

A soldier, serving his period of training, was employed in a military camp in the construction of barracks. He was killed as the result of the criminal negligence of the supervising contractor. Suit was brought against the contractor and the State; the lower administrative court considered that the administrative action was merged in the civil tort (which if that of a servant would have been a faute lourde). The Council said the mother of the soldier did have an action against the State, not derived from the tort, but created by the injury she had sustained from the operation of the public works.[54] So the death of a soldier resulting from military maneuvers (in time of peace), was a fault of the service, and required an indemnity.[55]

The owner of a sandpit on the banks of a river had been the subject of numerous acts taken by the Administration to compel him to relinquish his holding without compensation, and incorporate it in the river bed. The prefect, acting under an illegal condemnation order of the prefectorial council, which was then being considered on appeal by the

[52] M. Teissier. Nothing strikes the American reader more forcibly than the attitude taken by these government commissioners. They actually realize that there may be two sides to the question, and that the government whom they represent may be in the wrong. They construe their function to be the elucidation of the truth and the settlement of controversies on equitable grounds; they are never mere advocates. The American Attorney-General, would probably, after recovering from the shock of reading some of their "conclusions," immediately cast them into outer darkness as dangerous heretics. Mr. Dicey by an oversight does not list this attitude as another indication of the superiority of the rule of law over administrative law.

[53] Feutry, Sirey, 1908, 3, 97.

[54] Auge-Chiquet, Dalloz, 1915, 3, 3.

[55] Auxerre, Sirey, 1905, 3, 114.

Council of State, took possession of this land. This was a plain "act of authority"; but, said M. Romieu, government commissioner, the old idea of state irresponsibility was too absolute, and, "derived from the old conception of the irresponsibility of the royal power, it is no longer in harmony with the modern idea of law." The Council of State agreed, and awarded damages for this abuse (détournement) of power.[56]

A company had a contract with the State for the exploitation of a colony, and asked damages from the state because the acts of certain local officials had rendered the employment of the natives by the company more difficult, and had seriously embarrassed its commercial operations. The Minister denied responsibility, saying the acts complained of were personal faults. With this the Council agreed, but said these personal faults were "accomplished by an agent of the State, in the exercise of his duty." The indemnity was allowed.[57] A contractual obligation impaired by the action of communal officers similarly made the commune liable.[58]

If, however, the contract with the state is changed by a general law affecting all alike, and incidentally the contractor, then the state is not liable. A steamship company had a contract with the state to carry the mails at a stipulated rate. Later the state for purposes of revenue, changed the tax rates on different gauges of vessels. This was applicable to all vessels, whether mail ships or not. The company alleged a breach of its contract, because the rates of taxation of its ships had entered into its estimates on which the mail contracts were based. The court rejected the plea; the law was a general one, operating alike on all.[59]

An interesting case illustrating the doctrine that two re-

[56] Zimmerman, Sirey, 1905, 3, 17.

[57] Compagnie commercial de colonisation du Congo Français, Dalloz, 1910, 3, 111.

[58] Carretier, Dalloz, 1911, 5, 56.

[59] Cie. Générale transatlantique, Cons. d'Etat, 19 nov. 1909, 27 R. D. P. 79-83. By law at the time the contract was made, the state had a right to change the gauge classification; this was not made the basis of the decision.

sponsibilities may arise from the same set of facts, one involving a fait personnel, the other rendering the State liable in damages, was that of M. Auguet.[60] The complainant, who had entered a post office to make use of the service afforded, was prevented from leaving by the usual public exit because the door had been closed before the accustomed time. On the invitation of an employee, he started to make his departure through a part of the office reserved exclusively for employees. Two who were engaged in handling valuable articles seized him and ejected him so violently that he fell in the street and broke his leg. The Administration, of its own accord, had punished these two officials, thus unmistakably establishing a personal fault. The victim subsequently brought an action against the state, and the Council recognized its validity, saying that although there was personal responsibility, the accident had been attributable as well to "mauvais fonctionnement du service public"—here the premature closing of the public exit.

This double liability was even more clearly presented in another case, involving a fault in the execution of a public work. An excavation had been made in the yard of a public school, but through the negligence of the employee charged with the duty, no barricade or protection had been placed around it. A pupil in crossing the yard fell in and was killed. The child's parents sued both the negligent employee and the commune before the civil court. Conflict was raised, and the Tribunal of Conflicts sustained the suit against the officer, but rejected that against the commune, not because the commune was not liable, but because suit should have been instituted against it in the administrative courts.[61]

This responsibility of the State was invoked under most peculiar circumstances. A man had been injured in the public service, through a telephone wire which he was erecting coming into contact with a trolley wire. By law, the trolley company was required to have its wires insulated, to prevent

[60] Sirey, 1911, 3, 137; note by Hauriou.
[61] Provost, Trib. des Confl., 2 mai 1914, 38 R. D. P. 345-346.

just such accidents. The worker recovered from the State, which then sued the trolley company for the amount of the judgment. The Council of State limited recovery to one-half, that is, compelled the state to pay one-half, because, although the trolley company had been negligent, the Administration also had been negligent in not supplying the injured worker with proper equipment—here, rubber gloves.[62]

The decisions of the Council of State in the last decade have shown the most marked development of the doctrine of State responsibility, and have further introduced the interesting question of the responsibility of the official to the administration itself.

Joint Responsibility of State and Officer.—The commune of Roquecombe had provided a shooting gallery on the banks of the river; firing was directed at objects floating on the water. M. Lemonnier, who was walking along the river shore, was struck by a bullet and killed. His widow sued the mayor as an individual and as mayor, in the civil courts. The lower court rejected both actions; the higher court rejected the action against the mayor *qua* mayor, but awarded damages against him personally. This was reversed by the Court of Cassation on the ground that the evidence did not show any personal negligence on his part. Before the Court of Cassation had announced its decision, the widow sued the commune before the Council of State. Damages were awarded because proper supervision had not been exercised, the court saying:

> . . . the circumstance that the accident proved was the consequence of a fault of an administrative agent charged with the execution of a public service, which had the character of a personal act of such a kind as to entail condemnation of this agent in damages by the ordinary judicial tribunals, and that even if this condemnation had been definitively established [the decision of the Court of Cassation exonerating the mayor was announced later], it would not have the effect of depriving the victim of the accident of the right to sue directly against the public person which has charge of the operation of the public service attacked, for recompense for the injury suffered.

[62] Poitiers, Dalloz, 1910, 3, 9.

The Council accordingly condemned the commune to pay 12,000 francs,

> . . . under the reservation, however, that the payment of it should be subordinated to the subrogation of the commune by L. up to the extent of the said sum, to the rights which result to L. from the judgments which have or which may be finally rendered to her benefit against the mayor personally by reason of the same accident, by the judicial authorities.[63]

As M. Hauriou points out in his note to the case, the victim had three rights of action; one against the direct author of the injury, one against the administrative agent, personally, who was charged with the service, if he had been guilty of a gross fault in the organization or operation of the service, and one against the governmental organization to which the service was attached. This latter was the most important, because of the possible insolvency of the individuals.

This right of subrogation was invoked in another case arising under similar circumstances; here a judgment was obtained against the proprietor of the shooting gallery, who was insolvent. The facts showed a fault in the public service in allowing the gallery to be placed where it was; the Council of State charged the commune with the amount of the judgment recovered against the proprietor, and subrogated the commune to the victim's rights against the proprietor.[64]

The effect of these decisions is practically to make the state the guarantor or surety of the actual wrongdoer, whenever the accident can be traced to a faulty functioning of the public service, even in matters of police. Of course, the victim should not recover double damages; but he or his representatives should be entitled to recover the actual damage, not merely a judgment. The state is secondarily responsible, but still responsible. Subrogation is really the recognition of the status of guarantor. Another case adopted this view, and held that in an accident arising from the prosecution of a public work the personal responsibility of

[63] Lemonnier, 36 R. D. P. 40, Sirey, 1918, 3, 41.
[64] Thevenet, 33 R. D. P. 378, 384. Cons. d'Etat, 23 juin, 1916.

the agent did not necessarily exclude that of the State. Damages had already been assessed against the agent in the civil courts; the Council of State limited the responsibility of the state to the guaranty of that part of the judgment (all if necessary) which represented the loss to the victim.[65]

This responsibility of the state will be recognized even for the acts of its military forces, if it can be shown the accident was occasioned by faulty supervision. For instance, a non-commissioned officer had brought back from the trenches an unexploded German grenade, although the orders strictly forbade it. The possession of this grenade was known to his superior officer. While quartered in a private house, the soldier tried to take apart the grenade. The representatives of two who were killed, sued the state. The Council of State allowed the action, saying that:

> . . . although there may be personal responsibility on the part of the non-commissioned officer who caused the explosion the accident must be considered as the consequence of the "une faute du service public" of a kind to entail, in regard to third parties, the pecuniary responsibility of the state.[66]

Similarly where a soldier stationed in a private house, in a fit of drunkenness killed a child, the Council of State recognized the personal fault of the soldier, who had been condemned to death, but considered that there was also a fault in the functioning of the service, for "all the circumstances show an absence of supervision, which constitutes a charge on the state, entailing its responsibility."[67]

Social Risk.—The Council of State has thus recognized a cumulation of responsibility; the same act may entail the responsibility of both the servant and the state. Logically this is insupportable on any theory of fault as the basis of responsibility, and was so recognized in the earlier cases—jamais du cumul.[68] Under the "fault" theory, if the act

[65] Babouet, Sirey, 1920, 3, 5.
[66] Beaudelet, Dalloz, 1920, 3, 1.
[67] Lhuilier, Cons. d'Etat, 14 nov. 1919, 38 R. D. P. 345.
[68] On the subject of cumulation see Cot, op. cit., and Dupeyroux,

was a personal fault on the part of the agent, then he acted not as an agent, but as a man, and was personally liable before the judicial courts; the state was not liable. If the act was a fault of the service, the state alone was liable, before the administrative courts; the agent was not responsible.[69] M. Jèze[70] considers it "pure casuistry" to say that if the agent, acting in the exercise of a function entrusted to him, commits a fault of a particular nature, he is no longer engaged in the exercise of his functions. Such reasoning he feels to be neither just nor practicable. Where a fault has been committed by one in the service, a real, not a "platonic" judgment should be given. Jèze advocates a doctrine of insurance against the social risk, rather than one of fault.[71] The Council of State seems to have adopted Jèze's reasoning. This learned jurist has also made a convert of Duguit, whom Jèze in 1914 classed as the only survivor of the theory of non-cumulation.[72] Duguit attributes the decision in the Lemonnier case to Jèze's reasoning, and himself now adopts the theory of social risk.[73]

Fliniaux, in an article which though published in 1921[74] seems already to be recognized as a classic, feels that the Council of State has not gone all the way in recognizing that

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op. cit.; the concluding chapters of both theses are devoted to this subject. Probably the best article is that of Fliniaux, in R. D. P. 1921, p. 333.

[69] Dupeyroux, op. cit. 231 ff., citing Hauriou, 9 ed. 532. This is strongly reminiscent of our attitude toward the State and its agents. The State can act only according to and through law; if therefore an act is illegal, it is not the act of the State, but that of the officer. The application of the "rule of Law" in the cases of Lemonier, Thevenet, Babouet, Lhuilier and in the cases to follow would have led to exactly opposite results. Which rule is preferable depends upon whether you are the victim—or the theorist.

[70] 31 R. D. P. 572, 579.

[71] Ibid., 581.

[72] Ibid., 575, citing Duguit, Les Transformations, 1913, pp. 274, 277.

[73] 40 R. D. P. 23, 30. This fault theory and the distinction between personal fault and fault of the service arose at a time when the theory of risk was not recognized; it was created for the benefit of the public servants, as a rule of jurisdiction, not of law (Jèze, 31 R. D. P. 572, 579; Fliniaux, 38 R. D. P. 333, 334, 337).

[74] 38 R. D. P. 333.

the state is responsible as an insurer against the social risk, but that in every case where there has been a cumulation, that is, where the state and the individual have been held liable, there have been, together with the fault of the individual other facts creating state liability. All the cases in which cumulation has been recognized he feels can be grouped in four classes.

Together with the fault of the individual there may be:

1. A contractual relationship between the state and the complainant, existing before the damage was done.—Cie. Colonisation Congo Francais; Carretier.
2. A fault of the service.—Beaudelet, Lemonnier, Lhuilier.
3. Damage occasioned by the operation of public works.—Provost, Babouet.
4. Damage covered by a special law providing for state responsibility.[75]

But in every case it was the act of the agent which resulted in his personal responsibility, and which also caused a fault in the service. The state obligation arises from, though it may not be the same as, the act of the agent. The theory of fault, manifest in private law, is applied to the individual, and determines his responsibility, but the responsibility of the state seems to be that of an insurer against injury from any cause, even the personal fault of its servants, in the operation of the public services. It is not unreasonable that in the performance of these services which can be rendered by the state alone, or by it more efficiently, it should guarantee that citizens brought in contact with these services should not be injured through the employment of defective manpower any more than defective materials. It is as certain that some incompetents will be employed as that some defective machinery will be used; the danger is the same in both; the guarantee should be the same.

Liability of Officials to the State.—Of course as long as the

[75] 38 R. D. P. 333, 339-349.

old theories of personal fault and fault of service were employed, there could be little question of responsibility of the servant to the service; there could consequently be no question of contribution, where there were no opportunities for both to be liable. But if the responsibility of the state in any case where the servant is liable be once admitted, the question does arise as to the rights of the state against the servant. If the state pays indemnity, should not it recover from the officer. If the state and the officer are both sued, then according to modern rules the state is subrogated to the rights of the victim against the officer (Lemonnier, Thevenet); or guarantees payment if judgment cannot be enforced against the officer (Babouet). But if the state alone is sued, if the victim does not pursue his remedy against the officer also, the state has no remedy; it is not subrogated to a mere right of action.[76]

This inability of the state to recover unless the officer has been sued by an individual is not altogether the fault of the Council of State. It arises really from the definite legal provisions for responsibility of officers to the Administration in two cases, which has led the Council to consider that responsibility in other cases is negatived. The law provides that the Administration may hold accountable public disbursing agents and ministers who have obligated the state without or in excess of an appropriation for losses caused by them.[77]

An officer during the War had illegally caused an individual to be shot. The family was allowed 40,000 francs,

[76] Jèze, 41 R. D. P. 600, 607; Fliniaux, 38 R. D. P. 333, 349. In Germany this was solved by the law of May 22, 1910, by which ". . . the State has substituted its liability for that of the officer in favor of an injured individual. The liability of the State is primary and excludes that of the officer, the State merely reserving a subrogated right of recourse against the offending officer. Soldiers are included among the officers covered by the statute, but the reponsibility of the State is excluded in case of officers who are remitted only to the collection of fees from private persons" (Borchard, op. cit. 145-146).

[77] Jèze, Eléments, 102. The provision for ministerial responsibility has never been enforced.

which the Minister of War charged against the officer. In annulling this action, the Council of State said:

> . . . the pecuniary responsibility of an officer other than a public paymaster (comptable) has not been recognized as being raised toward the state by reason of faults committed by him in the course of his duty (a l'occasion de ses fonctions), unless under a special legislative provision that authorizes the minister to declare him a debtor. . . .[78]

There was no such legislative sanction in this case, so the action of the Minister was wrong.

To mention this condition is to show the need for a remedy. It would seem that the difficulty could be solved by requiring the victim first to sue the agent, the state to guarantee payment of this judgment if the agent were insolvent[79]; or by bringing action first against the state, and subrogating it to the complainant's right of action against the agent; or the state might be allowed in any event to prosecute the offender in an independent civil action.[80]

Liability without Fault.—The latest step in the progress of the jurisprudence of the Council of State, a step that was foreshadowed in its decisions allowing cumulation of actions, has been the direct recognition of the responsibility of the state *without fault,* whenever a special damage has been done, or an abnormal sacrifice required.

In 1912 the Council refused to admit the responsibility of the state where no fault could be shown. The battleship *Iena* had exploded, and a shell had killed Ambrosini on a street in the town outside of which the ship was anchored. In rejecting the suit brought by his parent, the Council said:

> Whereas it results from the evidence that the decease of the plaintiff's son must be attributed to force majeure; that there has been presented no circumstance of a nature to involve the responsibility of the state; that accordingly M. Ambrosini has no ground to maintain that the Minister of War was wrong in rejecting his request. . . . Rejected.[81]

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[78] Poursines, Cons. d'Etat, 28 mars 1924, 41 R. D. P. 600, 602.
[79] Fliniaux, 38 R. D. P. 360.
[80] Jèze, 41 R. D. P. 608.
[81] Ambrosini, Sirey, 1912, 3, 161.

The military authorities had accumulated a large quantity of grenades in the barracks at Fort Double-Couronne, located close to a large settlement. The operations required under the emergency of war to supply promptly the armies in the field entailed "risks exceeding the limits of those necessarily resulting from the neighborhood. . . ." An explosion occurred, but no fault was shown. The Council held that the risk created by the accumulation of such a store near an inhabited area was of such a nature as "to entail independently of all fault the responsibility of the state." [82]

When the sacrifice required by the operation of the public services is exceptional, and not similar to that borne by others, the State will by indemnity equalize the burden. Some French officers had been sent to Poland under an agreement between France and Poland whereby if any officer was not kept by Poland, it would forfeit to him three month's pay. Later the French government, to the knowledge of these officers, entered into a new agreement that led them to believe that if they continued in Poland they would remain entitled to the same provisions. These officers were recalled by the Minister of War, who knew at the time the new agreement was made that such officers could not be kept in Poland much longer. Poland refused to pay; the Council of State awarded the officers their three month's forfeit.[83]

Couitéas, a French citizen resident in Tunis had recovered two judgments in the civil courts, ousting certain natives from his lands. These the French authorities in Tunis had refused to enforce. Couitéas claimed that as a result he had been prevented from enjoying his property, and asked damages. The government had refused to use the force necessary to expel the natives because it feared the political consequences. The Council of State considered that the government was charged with maintaining peace and order within the district, and consequently had a right to refuse to enforce

[82] Sirey, 1918, 3, 161. Regnault Desroziers.

[83] Martin et Thiéry, Cons. d'Etat, 29 feb. 1924, 41 R. D. P. 611-612.

the judgments if such procedure would lead to serious disturbances; but one who had recovered a judgment was also entitled to count upon the government for its enforcement. Where such enforcement was justifiably refused, for political reasons, and such a condition seemed destined to be permanent, part at least of the damage caused by non-enforcement of the judgment should be borne by the community in whose interest the burden had been imposed, and it was so ordered. Equality of sacrifice was the keynote sounded.[84]

We find the Council of State endeavoring to equalize among those who benefit by administrative measures, the burdens that public administration entails. Whether the loss has been caused by the personal fault of the agent, or has been without fault, or has resulted from a perfectly legal administrative action, if its result has been to place a more than proportionate share of the burden of administration on one or a few, those injured may sue and recover from a solvent state. This jurisdiction has been developed from the power given the Council of State to "render final decision in administrative controversies." An insight into the national mind, and perhaps national morality may be gained by a comparison of the interpretation of these few words with that given by American courts to their authority to hear and determine "controversies . . . to which the United States is a party." —The rule of Equity vs. the "rule of law."

[84] Couitéas, Cons. d'Etat, 30 nov. 1923, 41 R. D. P. 75, 96 ff.

CHAPTER XI

The State Before Foreign Courts

The sovereign (including here both the titular head of the State and the State itself) enjoys much the same status before foreign courts that it does before its own courts; but the basis of this judicial immunity must be recognized as different in the two cases. At home, the sovereign is exempt because it establishes courts and promulgates law; when, however, the sovereign is brought or comes into relations with individuals outside its territory, its exemptions from suit should be ascribed to comity alone; any other supposition would be in derogation of the sovereignty of the state in which exterritoriality was sought to be asserted as a matter of right. As regards the person of the sovereign at a time when the king really was the State, when it was his patrimony, it is not difficult to understand the basis of this exemption; each king would grant it to another prince within his borders that he, in turn, might receive equally favorable consideration under similar circumstances. When the king came to be regarded rather as the agency of the State than the State itself we find the custom of immunity still retained, now by the State. This again is probably an historical reminiscence. It is justified as a necessary attribute of sovereignty; an equal cannot be judged by his equals[1]; the independence and equality of each state demand that it be exempt from any burden to which it does not consent.[2] Then there would ordinarily be difficulty in executing a judgment against a foreign state,[3] and any such attempt would probably lead to international complications or actual strife.[4]

It might be asked whether it is not a derogation from the sovereignty of any state that it should feel constrained not

[1] Magna carta indicated, that, as regards individuals, this was a requisite for a fair trial.

[2] Feraud-Giraud, Etats et Souverains devant les Tribunaux Etrangers, Paris, 1895, i, 31—collecting the views of publicists.

[3] Ibid., p. 32.

[4] Ibid., p. 33.

to exercise its jurisdiction fully over all persons or objects within its territory; such would be at least as logical a conclusion from "equality and independence" as exemption. If each state enforced its laws against all other states, there would be substantial equality. True, there would be difficulty in enforcing judgments unless property of the foreign state were within the court's jurisdiction; in private law, that has never led the courts to decline to render judgments against an insolvent. It is also doubtful if the actions of supposedly impartial judges would result in greater strife and conflict than has been caused by the exertion of diplomatic pressure. But, whether justified, or merely the vestigial reminder of an outgrown period of uncivilization, the exemption remains.

A foreign sovereign cannot be held legally responsible for his acts, even before the courts of the country in which such acts were done.[5] Probably the most famous case is that in which the English courts refused to entertain an action for a breach of promise of marriage made by the Sultan of Johore while in England, traveling incognito, as a simple British subject. "A reigning sovereign is not subject to the jurisdiction of a foreign country."[6] In 1912 this was applied to the Gaekwar of Baroda, who was "not independent" but who exercised the "various attributes of sovereignty . . . subject to the suzerainty of H. M. the King of England." An attempt had been made to make the Gaekwar a co-respondent in a divorce case; this was refused, as contrary to International Law. The court, though striking out his name, gave leave "to proceed without making any co-respondent as to those paragraphs in which his Highness's name appears," so it is probable that the aggrieved husband obtained his relief.[7]

This principle was applied in two French cases. In France the Civil Code[8] allows suits in French courts against a foreigner, even a non-resident, for the enforcement of obliga-

[5] Feraud-Giraud, op. cit. i, 157.
[6] Mighell v. Sultan of Johore, L. R. 1 Q. B. 149, 154 (1894).
[7] Statham v. Statham, 1912, P. 92, 95.
[8] Art. 14, Code Civile.

tions contracted at home or abroad with a Frenchman. Miss Masset, " Prétendant être victime d'un acte arbitraire commis par le Czar a son préjudice " cited him before a French court, to answer in damages. Judgment by default was given. The French Government interposed an appeal, on which the judgment was annulled for lack of jurisdiction. The court said the provision in the Civil Code was intended to apply only as between individuals, and was not intended to abrogate the rules of International Law which recognized that a foreign sovereign was immune from the jurisdiction of the courts.[9] In another case suit against the heirs of the Emperor Maximilian for what was alleged to have been his personal obligation, was annulled when the court found that the Emperor had acted in his capacity as head of the State, not in a private capacity.[10]

Of course, if a foreign sovereign cannot be held in the courts of a state for his acts done in that country, there would be even stronger reasons for not holding him for acts done abroad. The English courts accordingly declared they had no jurisdiction over the King of Hanover, who was also a British subject, to compel him to account for money he had received while acting as guardian of a British subject, but at a time when he was King of Hanover. " A foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign capacity in his own country, whether it was right or wrong." [11] This exemption, however, apparently inheres in the sovereign only so long as he is such. In a suit brought against him, the Duke of Brunswick pleaded that at the time the debt sued on was incurred, he was the sovereign of Brunswick. The plea was held bad because it did not allege that at the time he was sued he was still reigning sovereign.[12]

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[9] Dalloz, Jurisprudence Général, 1871, 2, 9; Sirey, Recueil, 1871, 2, 6.

[10] Dalloz, 1873, 2, 24; Sirey, 1872, 2, 68.

[11] Brunswick v. Hanover, 1848, 6 Beav. 1, 2 H. L. Cas. 1.

[12] Munden v. Duke of Brunswick, 10 Q. B. 656. The East India Company acted sometimes as a trader, sometimes as sovereign. In

If the exemption of the head of the State so long as he remains such, is granted out of respect for the state he represents, it would seem to be immaterial whether the head happened to be a King or President,[13] for the President represents the State, even if he embodies only the Executive power of the Government.

The chief diplomatic officers, during their term of office and for a reasonable time thereafter, share as representatives of the State its own immunity, at least to an extent that prevents any action against them that would interfere with the performance of their duties.[14] In the United States it was early recognized that this immunity was not the privilege of the minister but of the sovereign who sends him, and consequently can be waived only by the consent of the Sovereign.[15] In England, a minister was allowed to be sued as a joint contractor, where he had consented to the initial proceedings. He was a necessary party to the suit, but no intention was shown to interfere with his person or property, but he was joined only to enable the ascertainment of the liability of the other joint contractors.[16] Participation in a trading enterprise does not constitute a waiver of immunity and require contribution by the minister on a dissolution of the company.[17] A minister who waived his immunity through ignorance of his privilege was later allowed to assert it.[18]

The law in England now seems to be that the consent of the sovereign is necessary for a waiver by the minister. At-

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a suit against it, its plea was overruled for failure to produce sufficient evidence that at the time of the transaction it acted in a sovereign capacity (Nabob of the Carnatic v. East India Company, 1 Ves. Jr. (Ch.) 371).

[13] Feraud-Giraud, op. cit. i, 169.

[14] See Feraud-Giraud, op. cit. i, 249 ff.

[15] U. S. v. Benner, 1830, Fed. Cas. No. 14,568.

[16] Taylor v. Best, 14 C. B. 487, 23 L. J. C. P. 89 (1847).

[17] Magdalena S. Navigation Co. v. Martin, 2 E. & E. 94, 28 L. J. Q. B. 310. The court suggested that an ambassador need not be extended credit in the future unless he could find a suable surety.

[18] Re Bolivia Exploration Syndicate, L. R. (1914) 1 Ch. 139. Here the court said knowledge of the law could not be imputed to a diplomatic agent. It would be to the most ignorant private person, native or alien.

tempt was made to hold a minister liable for a shortage in his accounts as administrator of a decedent. He had attempted to waive his privilege, but a writ of sequestration was refused.[19] He left the country; notice of his dismissal from the diplomatic service was received, after which the writ was issued.[20] In another interesting case this diplomatic immunity was turned against an ambassador's estate. The ambassador had borrowed money from G. He continued ambassador for twelve years; two months after the termination of his office and without the formality of paying his debts, he returned to his country where five years later he died. In winding up his estate in England, G. was employed to make certain collections, which he did, and retained the amount of the original debt. The executor pleaded the statute of limitations, the debt being then about eighteen years old. The court said an ambassador was protected from suit while ambassador and for a reasonable time thereafter; that on his return to his country the action for the first time accrued; but the statute of limitations saves to the creditor, when the action accrues while the debtor is overseas, his remedy for six years after his return; so the debt was good.[21]

If the representatives of a sovereign state are immune from the jurisdiction of the courts of foreign countries, of course the states themselves would be at least equally immune. This exemption is usually manifested in the immunity of state property within the territorial jurisdiction of another state, from the process of the courts.[22] The sovereign State cannot, through attacks on its property in foreign courts, be compelled against its will to submit to the court's jurisdiction.

A development company had deposited with the Crown agents a large sum to the credit of the Government of the Kelantan, a "sovereign" Malay state, with which the company had a contract. In the settlement of a dispute between

[19] Re Suarez, 117 L. T. 239. (1917 Ch. D.).
[20] In re Suarez, 1918, 1 Ch. 176 (C. A.).
[21] Musurus Bey v. Gadban, L. R. 2 Q. B. 352 (C. A.) 1894.
[22] From necessity such exemption would not extend in every case to real property within the confines of another state (Vattel, B. 4, Ch. 8, s. 114).

the two, the arbitrator selected had made an award in favor of the company. Kelantan appealed, and lost. The company then wrote to the Crown agent to hold the funds in his hands, but met with refusal. Then the company sought to attach debts owing by the Crown agent to Kelantan. In dismissing the garnishment proceedings, Lord Russell said he "had no information about the pitch of civilization attained by the State of Kelantan, but it was sufficiently high to make it prefer not to pay its just debts." [23]

> Before the court could (create a right of action and enforce it) the sovereign State must have submitted to the jurisdiction for that purpose, and this it had not done. Judgment and execution were two different things, and the initial submission to the jurisdiction in the appeal from the arbitrator's award did not preclude the sovereign State from now invoking that international comity which induced this country to decline to exercise its territorial jurisdiction over the property of a sovereign state within its territory.[24]

A well-known case is that of *Vavasseur* v. *Krupp*.[25] The Mikado had purchased certain projectiles in Germany, which were brought to England to be loaded on some ships being constructed for him. While in England an injunction was issued to restrain their delivery to the Mikado, on the ground that they were an infringement of an English patent. The Mikado moved to dissolve the injunction, and was admitted as a party defendant on "submitting to the jurisdiction of this court" and "on payment into the court by the Mikado of 100 pounds as security for costs." [26] Despite this, it was held his submission has been solely as to "discovery, as to process, as to costs" [27] and was not a submission of his

[23] Duff Development Co. Ltd. v. Government of Kelantan (1922), 39 T. L. R. 96; but see Gladstone v. Musurus Bey, 32 L. J. Ch. 155.

[24] Ibid., 97. The case was affirmed on appeal, 39 T. L. R. 186. The Master of the Rolls said he must agree with the lower court, but hoped he would be reversed in the House of Lords, "as he had no sympathy whatever with those sovereign states which initiated proceedings in regard to commercial transactions, and then, having failed to succeed, said that it was inconvenient to pay the costs incurred." It would seem from cases to follow that security for costs could have been required.

[25] L. R. 9 Ch. D. 351 (1877).

[26] Ibid., 352.

[27] Ibid., 386.

property to the jurisdiction of the court. The injunction was in terms against the consignee; the intervention of the Mikado was considered as intended solely to protect the English consignee. The injunction was dissolved, because it affected the property of a sovereign.

Similarly on suits of attachment arising out of the non-payment of bond issues by Spain [28] and Portugal [29] such actions were considered "contrary to the law of nations and an insult which he (the sovereign) is entitled to resent." [30] The court held that sums due a sovereign could not be made liable for equally as clear obligations due by the sovereign to the plaintiff. It seems that objections to garnishment of the property of a foreign sovereign may be made either by the sovereign himself [31] or by the garnishee, who otherwise might be forced to pay double.[32] A third person cannot be enjoined from exercising privileges he has received from a foreign sovereign even though the granting of such privileges constituted a violation of the contract of the sovereign with the petitioner for the injunction.[33]

The principle of the exemption of the sovereign through immunity of his property is generally recognized. American courts refused to allow an action against a foreign railroad owned and operated by a foreign sovereign, the revenue from which constituted part of the public funds of the country. The action was an attempted damage suit for negligence.[34] Likewise when French merchants attempted to secure payment of a bill of exchange given them by the Spanish government but dishonored at maturity, by attaching money due Spain on a judgment against another French merchant, the Court of Cassation dissolved the attachment.[35] Belgium took

[28] Wadsworth v. Queen of Spain, 17 Ad. & El. (Q. B.) n. s. 169.
[29] De Haber v. Queen of Portugal, 17 Ad. & El. (Q. B.) n. s. 195.
[30] Ibid., 206. Is it correct to class as an insult calling a thief a thief?
[31] Vavasseur v. Krupp, supra.
[32] Wadsworth v. Queen of Spain, supra.
[33] Gladstone v. The Ottoman Bank, 1 H. & M. (Ch.) 505.
[34] Mason v. Intercolonial Rwy. of Canada, 197 Mass. 349, 83 N. E. 879.
[35] Dalloz, 1849, 1, 5; Sirey, 1849, 1, 81.

the same attitude, refusing an attachment on guns being shipped from Essen to Turkey for damages arising from breach of contract by the Turkish government.[36] Germany refused to allow funds of Russian bankers in Berlin to be levied upon to satisfy a judgment given against Russia in German courts in China.[37]

This immunity of the State can of course be waived by it. Any affirmative action showing its consent to be sued will be sufficient. Where in a suit to recover taxes alleged to be illegally assessed, the Attorney-General appeared generally, he could not object eight months later, after the pleadings had been amended and answered. His appearance constituted a waiver.[38] In an ejectment case, where the Attorney-General appeared, and then objected to the jurisdiction immediately after the plaintiff had amended his declaration, appearance was again held to constitute waiver.[39] A suit by a state to recover a fund standing to its credit is not a consent to submit to garnishment proceedings that may previously have been instituted against the fund.[40] The appearance of a sovereign merely to enjoin disposition of funds until a new trustee could be appointed did not allow the assertion against it of claims that the other party interested in the fund might have. The relief asked was too foreign to the purpose for which the sovereign had appeared.[41]

There is no doubt concerning the ability of the State,

[36] Feraud-Giraud, op. cit. ii, 342-343.

[37] Von Helfeld v. Russian Government, 5 American Journal of International Law, 490. Apparently the funds sought to be attached were credits of the Russian government.

[38] Richardson v. Fajardo Sugar Co., 241 U. S. 44, 60 L. Ed. 879.

[39] Porto Rico v. Ramos, 232 U. S. 627, 58 L. Ed. 763. This and the preceding case were waivers by Porto Rico, which country is within the usual rule exempting sovereignties (Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 57 L. Ed. 507. See also Veititia v. Fortuna Estates, 240 Fed. 256. C. C. A.)

[40] Roumania v. Guaranty Trust Co., 250 Fed. 341, C. C. A. The decision seems to have been influenced by the fact that the attaching creditor did not offer evidence sufficient to have justified interpleader by the depository even in a suit by individuals. This should have been the basis of the decision.

[41] South African Republic v. Cie. Franco-Belge, 1898, 1 Ch. 190.

through its titular head, to sue in the courts of a foreign country.[42] The American courts regard the suit, though in the name of the sovereign if a monarchy, to be really that of the state; hence no change in the monarch will affect the suit.[43] The English courts consider that in a monarchy "all the public rights and interests of the nation are vested in and represented by the monarch. In a republic they are the property of the State. When a foreign monarch sues in the courts of this country it is not as the representative of his nation but as the individual possessor of the rights which are the subject of the suit." A republic, however, has an equal right to sue, and in its own name.[44] The early opinion had been that in a court of chancery a republic would have to sue in the name of an officer, so that the defendant would have some one on whom process could be served if the defendant prayed discovery, or filed a cross-bill.[45]

Where, however, the foreign sovereign comes in as plaintiff, he is subject to the ordinary rules of court, as to costs, counterclaims, cross-actions and procedural law in general.[46] One of the most common instances is the requirement that the sovereign must give security for costs.[47] The old rule in England allowed a maximum requirement of 120 pounds; after the Judicature Act (1873) the Chancellor could require any security commensurate to the amount involved. A state which had instituted suit prior to this change in procedure was held subject to it, and proceedings were ordered stayed until the additional security was furnished.[48] A New York statute requiring security when the plaintiff was a non-resi-

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[42] Feraud-Giraud, op. cit. i, 222.

[43] *The Sapphire*, 11 Wall. 164, 20 L. Ed. 127, 130.

[44] U. S. of A. v. Wagner, L. R. 2 Ch. Ap. 582, 587.

[45] Colombian government v. Rothschild, 1 Sim. (Ch.) 94. In the Wagner case, the court said if suit was brought by a republic in its own name, any remedy available to the defendant would be preserved by staying the proceedings until some officer capable of receiving service was named.

[46] Strousberg v. Costa Rica, 29 Weekly Rep. 125 (C. A.).

[47] Emperor of Brazil v. Robinson, 1837, 1 Nev. & P. 817; s. c. 5 Dowl. Ch. 522.

[48] Costa Rica v. Erlanger, L. R. 3 Ch. D. 62.

dent person or foreign corporation was held sufficiently broad to cover a foreign state.[49]

Where a sovereign sues in a foreign court the court has complete control over him, and may exact proper terms.[50] The King of Spain brought an action against English bankers for a fund deposited to his credit. They filed a cross-bill, denying many of the allegations, and alleging that there were documents within the King's possession showing that under Spanish law he had no title to the fund; they prayed discovery, answer under oath, and a stay of proceedings under the original suit until these prayers were complied with. The King sought to answer through a Spanish subject resident in England, claiming it was beneath his dignity to answer under oath. The House of Lords rejected this answer, saying that, though a sovereign prince, the King of Spain brought "no privileges that can displace the practice as applying to suitors in our courts." [51] Following this, the court of Exchequer restrained proceedings until the Queen of Spain complied with a request for discovery, filed by a defendant.[52]

Where agents of the King of Spain had obligated themselves as regards a loan negotiated by them for the benefit of the King, and then secured possession of certain revenues of the King pledged for the payment of this loan, which they used in liquidation thereof, they were entitled to set off this amount in a suit against them by the King.[53] Such a right

[49] Republic of Honduras, v. Soto, 112 N. Y. 310, 19 N. E. 845.

[50] Hullett v. King of Spain, 1 Dow. & Cl. (H. Lds.) 169. 1828.

[51] King of Spain v. Hullett, 1 Cl. & F. 1833.

[52] Rothschild v. Portugal, 3 Y. & C. Exch. 594. (1839). The House of Lords in 1840 refused a bill of discovery prayed as an aid in defense of an action at law, instituted by a Spanish subject for his Queen, on the ground that the Queen, not being a party to the record, was not subject to discovery. The Hullett case was said to have been a "bill for relief," not "discovery." The real basis of the decision seems to have been that the petitioner could have used his defense (failure of consideration) in the law suit without recourse to Equity (Queen of Portugal v. Glyn, 7 Cl. & F. 466. See also Glyn v. Soares & Queen of Portugal, 1 You. & Col. (Exch.) 644).

[53] Spain v. Oliver, 14 Fed Cas. No. 7813, p. 572.

is according to some cases a right of set-off alone; a defensive remedy, a mere matter of practice and procedure; hence, though it may be used to reduce pro tanto the amount claimed by the sovereign plaintiff, or even to extinguish it, it cannot be made the basis of an affirmative judgment.[54]

In another and what the author regards as a better considered opinion, the fact that execution could not be levied against a foreign sovereign did not prevent the court from rendering an affirmative judgment against it on a counterclaim. The Kingdom of Norway had sued the Federal Sugar Refining Company on the common counts for $165,000; the defendant counterclaimed for $219,000 damages suffered from breach of contract. The court considered that counterclaim and set-off had become substantive, rather than procedural, rights. If the court could allow a set off in a suit by a sovereign, the judge saw no reason why the further step should not be taken, and all controversies settled.

> While a court may have no power to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plaintiff state was indebted to the defendant. A modern court should strive to do complete justice. . . .[55]

It seems that if any defense by way of set-off or counterclaim is to be allowed, the court was correct in carrying the relaxation to its logical conclusion. The sovereign cannot be sued; if the sovereign makes use of the courts, he is subject to their provisions, whether as to counterclaim or otherwise. How can he be held to consent to set-off, even to the extinguishment of his claim, and yet not to allow a complete

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[54] McLean v. Commonwealth of Australia, 293 Fed. 192, cert. denied, 264 U. S. 582, 68 L. Ed. 860. That is, a suit by a foreign sovereign does not waive his immunity so as to allow an affirmative cause of action to be set up; the defendant may plead set-off, but may not counterclaim. Republic v. Inland Navigation Co., 263 Fed. 410, 412, where counterclaim was defined as a "cause of action in favor of the defendant and against the plaintiff, arising out of the same transaction or contract pleaded by the plaintiff, and on which the plaintiff's claim is bottomed."

[55] 286 Fed. 188, 193.

adjustment of all disputes, though the rules of the court so provide? The truth is that the sovereign, being immune from suit would not of his own accord submit even to set-off, but for the sake of the most obvious justice the courts have implied such a consent. It then becomes merely a matter of judicial discretion how far this constructive consent is to be carried; inability to enforce a judgment is entirely different from ability to render one.

The most frequent method whereby the property of a sovereign is brought within the territorial jurisdiction of another sovereign, and into relations with private individuals, is through water commerce. The contact between the sovereign and such individuals may be voluntary or involuntary, contractual or tortious; by vessels devoted entirely to police, or commercial usage; owned, operated or requisitioned by the State; but the result now seems to be the same; the sovereign cannot be sued without his own consent, nor may he be impleaded through his property; but the courts are open to him for the prosecution of his claims, where he may be met with matter constituting a defense, or set-off. In this respect the English and American practice has been nearly identical, although American courts, influenced by the peculiarly American doctrine of the personified ship as itself the contracting party or wrongdoer, have been slightly less liberal to the sovereign. The War, of course, greatly complicated matters by introducing a large state-owned or operated merchant marine where formerly the question had been presented mainly in regard to the actions of ships of war. Strictly, it should make no difference as to the type of ship or its use; state ownership or operation would be sufficient to oust jurisdiction, if sovereignty and its attributes form the ratio decidendi.

Underlying the whole modern law of the exemption of state-owned or controlled vessels is the famous case of the *Exchange*.[56] This boat, the property of two Maryland citizens, had been seized while on a voyage, by the forces of

[56] 7 Cr. 116, 3 L. Ed. 287 (1812).

Napoleon, taken into France, and converted into a public armed vessel. The next year the vessel put into Philadelphia where it was libelled by its American owners. The United States District Attorney suggested that it was a "public vessel," the property of a power with which the United States was at peace, and over which American courts had no jurisdiction. In citing this case and relying upon it, much capital has been made of the fact that the suggestion was merely that the vessel was "public property," and not "public armed property," from which the conclusion has been drawn that Marshall's argument and decision would be equally applicable to unarmed merchant vessels owned by a state. In Marshall's opinion, however, each reference [57] to the boat speaks of it as a "public armed" vessel.[58]

In deciding in favor of immunity Marshall considered that the sovereign must be presumed to have entered under an implied license, which exempted him from jurisdiction.[59] This immunity, being a grant, could be withdrawn at any time, but until expressly withdrawn, would be presumed to remain in existence.[60]

> . . . the Exchange, being a public armed ship, in the service of a foreign sovereign with whom the Government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.[61]

Some years later Sir W. Scott considered the question doubtful enough to allow an attachment of a foreign war vessel for salvage; it was released on appearance being entered, and was finally discharged under arbitration proceedings taken with the consent of the foreign government.[62]

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[57] See 7 Cr. 142, 144, 146, 147.

[58] See also Marshall's decision in Planters Bank, 9 Wh. 904, 907, 6 L. Ed. 244 to the effect that participation in a trading enterprise divests the sovereign of his attributes of sovereignty.

[59] 7 Cr. 144.

[60] 7 Cr. 146.

[61] 7 Cr. 147.

[62] The *Prins Frederick*, 2 Dods. 451 (1820).

In America, attachment of foreign government-owned vsesels used for commercial purposes has been allowed for salvage services, where at the time the service was rendered and the libel filed the vessels were not actually in the hands of the foreign government.[63]

The first important case in which the exemption of vessels owned by a sovereign but used for commercial purposes was discussed, was *The Charkieh.*[64] An action in rem for collision damages was filed against *The Charkieh,* a vessel owned by the Khedive of Egypt, but chartered to an English subject, and advertised for commercial purposes. The case must be considered as decided on the ground that the Khedive was found, despite his claim, not to be a sovereign; Sir Robert Phillimore intended his opinion to be considered as authority for the proposition that even if the ship were the property of a sovereign, the vessel would not be exempt, as it was engaged in commerce. The rule, applicable in regard to warships and ambassadors, that sovereign functions should not be inconvenienced, did not apply where the sovereign became an ordinary trader. No adjudicated case, he said, could be found to support the view that the sovereign, as trader, was exempt. The same judge, however, recognized that a war vessel was exempt from court process, even for salvage, and the same exemption was applied to the special commercial cargo she was carrying.[65]

The next case in point of time is also unsatisfactory in regard to the question of immunity of state owned vessels used for commercial purposes. The *Parlement Belge* was a public vessel owned and operated by the King of the Belgians, officered by Belgian royal officers, and engaged primarily in carrying the mails, though at the time of the collision which gave rise to the action she had on board a valuable cargo, and

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[63] Long v. *The Tampico,* 16 Fed. 491; the Johnson Lighterage Co. No. 24, 231 Fed. 365. Effect of *Western Maid* on these?

[64] L. R. 4 Ad. & Ecc. 59.

[65] *The Constitution,* 1879, 4 P. 39. A case of an American warship carrying Paris Exposition exhibits, entrusted to it by the United States probably to ensure this very exemption.

proof was introduced to show that she was accustomed to carry some cargo and passengers. By "treaty" or "mail convention" never sanctioned by Parliament, she was to be treated in English waters as a war vessel. Sir Robert Phillimore held that on the facts he could not "upon principle, precedent, nor analogy" hold her exempt; the fact that a treaty sought to give her the status of a war vessel showed that according to the ordinary principles of international law she was entitled to no such exemption; and the treaty, seeking to affect the rights of British subjects (by creating an exempt class of ships) was void because never ratified by Parliament.[66]

This holding was reversed on appeal.[67] The effect of the "treaty" was ignored; the decision, though often quoted, will bear repetition:

> The principle to be deduced from all these cases (including The Exchange) is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.[68]
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> The point and force of this argument (applying the exemption to all state property) is that the public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such states, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, by international comity, which acknowledges the equality of states, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all states.[69]

Lord Justice Brett then points out that in England the purpose of the maritime lien is to allow the owner to be impleaded; that the ship is not considered as itself the

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[66] The *Parlement Belge*, 1879, 4 P. D. 129, 149.
[67] 1880, 5 P. D. 197, C. A.
[68] Ibid., 214. [69] Ibid., 210.

wrongdoer. To allow a suit against the ship is really to implead its owner, here the sovereign, and compel him to sacrifice his property or his independence. The opinion concludes with words explaining the meaning of "public property . . . destined for public use" which really limit the case to the exact point that a ship used primarily for the mails is used for a public purpose, and is exempt. The following is *not* often quoted:

> . . . it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandises has been subordinated to the duty of carrying the mails.
>
> . . . used subordinately and partially for trading purposes does not take away the general immunity.[70]

The interpretation, however, placed on the decision has been that public ownership, regardless of the use to which the property is put, carries with it exemption. In the *Jassy*[71] an action in rem was brought for a collision. Bond was filed by the Liverpool representatives of the Roumanian government owner of the *Jassy*. The Roumanian chargé d'affaires certified to the Secretary of State for Foreign Affairs that the *Jassy* was owned by the Roumanian government and used for public purposes (commerce) and that bail had been offered without its consent. The ship was released on "the principle laid down in the *Parlement Belge*."[72]

But if the foreign sovereign comes in as plaintiff, as to recover damages for a collision, he comes in subject to the rules of court. A Belgian public vessel, employed in carrying

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[70] Ibid., 220.

[71] 1907, P. 270.

[72] Ibid., 273. The English cases apparently allow government ownership to be suggested directly to the court by some member of the foreign Embassy. This was followed in the lower Federal courts—The *Adriatic*, 253 Fed. 489 (Pa.); The *Carlo Poma*, 259 Fed. 369 (C. C. A. 2d), but the Supreme Court has decided that any such suggestion of immunity must come through the official channels of the United States, not by direct suggestion to the court by the Embassy. The *Pesaro*, 255 U. S. 216, 65 L. Ed. 339. The court will not take judicial notice that a ship is under public control. The *Gleneden*, 254 U. S. 522, 65 L. Ed. 383.

the "mails, passengers, and merchandise" (just as the *Parlement Belge*) libelled the *Newbattle* for collision damages. The *Newbattle* counterclaimed, and all proceedings on the original libel were stayed until the Belgian ship furnished security.[73] Similarly a foreign sovereign suing in the admiralty courts of the United States may be required to give security for costs.[74]

In the United States, the immunity of ships requisitioned [75] by or chartered to a foreign government, whether actually in its possession or not, seemed to depend upon whether the United States was at that particular time engaged in the War. Cases arising before our entrance, or after the termination of hostilities were decided against sovereign immunity; those during our participation, in favor of it. In a case in the Fourth Circuit, decided in 1916, a ship requisitioned by the Italian Government, with a crew paid and employed by the owner, was held subject to libel, the court refusing to create "a class of vessels for which no one is in any way responsible." [76] In another case admittedly similar, but which arose while the United States was at war, the opposite decision was reached, the court explaining that the previous case "was decided before this country became a cobelligerent with the Italian Government in the War against Germany." [77] Inter armas silent leges. Then in a case after the War, where a vessel at the time of the collision from which the case arose was under charter to France and at the time of the arrest was in its possession, the ship was held subject to the jurisdiction.[78]

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[73] The *Newbattle*, 10 P. D. 33, C. A. 1885.

[74] The *Jane Palmer*, 270 Fed. 609.

[75] See T. K. Nielson, Law and Practice of States with Regard to Merchant Vessels, 13 Am. J. Int. Law, 12; J. Whitla Stinson, The Requisitioned and Government Owned Ship, 20 Mich. L. Rev. 407; Charles M. Hough, Admiralty Jurisdiction of Late Years, 37 Harvard L. Rev. 529. See also Proceedings of the American Society of International Law, 1922, pp. 62, 77 ff.

[76] The *Attualita*, 238 Fed. 909, 911, 152 C. C. A. 43.

[77] The *Roseric*, 254 Fed. 154 (N. J. 11/22/18). It is true in the *Roseric* the ship was used for a "public service." but the basis of the decision was exemption because under government requisition.

[78] The *Beaverton*, 273 Fed. 539 (N. Y. 7/28/19).

In 1918 a vessel owned and operated by Chile, under the control of a commissioned officer, was held exempt, although used as a common carrier.[79] Then in 1921 a government owned and operated vessel, whose commander was not a naval officer, and which was engaged in ordinary commerce, was allowed to be libelled.[80] It would seem, however, from the "finesse of reasoning" in the *Western Maid*[81] that if a vessel owned by the United States was incapable of committing a tort because the government had not recognized that it could commit one, a similar ostrich-like attitude on the part of foreign governments would afford like immunity to their ships, on grounds of "Independence and Equality."

In England it was consistently held that a ship requisitioned by a foreign government was immune from process. It was true such requisition did not change the ownership, but it did prevent its use by the Government from being interrupted.[82] This was true even though the vessel was used in ordinary commerce.[83] The *Porto Alexandre,* a ship requisitioned by Portugal and used as a trader, was libelled for salvage. The cargo, privately owned, was made to bear the whole salvage expense and the ship was released. It would seem that if the ship were not subject to arrest, then for legal purposes she should be considered as never having come within the jurisdiction of the court, and consequently no jurisdiction should have been obtained over the cargo either. The Court of Appeals pointed out that when this

[79] The *Maipo,* 252 Fed. 627, 259 Fed. 367 (N. Y. 1918). Opinion by Hough, who was chiefly instrumental in securing modification of the Admiralty law in the United States as applied to vessels owned by it. His personal opinion was "that when a sovereign republic, empire or whatnot, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person." 259 Fed. 368. But he did not think the law was such.

[80] The *Pesaro,* 277 Fed. 473 (N. Y. 10/1/21).

[81] 257 U. S. 419, 66 L. Ed. 299; ante, pp. 131-134.

[82] The *Broadmayne,* 1916 P. 64 (C. A.)—a case of an English vessel, but the authority on which the decisions as regards foreign vessels were placed.

[83] The *Porto Alexandre,* 36 T. L. R. 28, aff. 36 T. L. R. 66 (Portugal); Victoria v. Quillwark, 1 Scots L. T. 65 (1922) United States vessel.

doctrine of the immunity of public owned vessels became fully appreciated, salvage services would be rendered government ships rather infrequently, and such ships would encounter difficulty in securing privately owned cargoes.[84]

In all the earlier English cases, the court was of the opinion that immunity from process in regard to a requisitioned ship lasted only as long as she was under requisition, and that on the termination of government use, the ship, then in private hands, would be subject to actions for acts done while under requisition. These opinions cannot be considered dicta on this point for they determined the form of the decree rendered. Instead of dismissing the libels as would have been done if no action could ever be maintained, the decrees of the court would stay the action "for so long as the ship shall remain under requisition by and in the service of the Crown." [85] The words above quoted were embodied in the decree of the court in another libel case against a vessel requisitioned by Italy.[86] "The plaintiffs, of course, will have their maritime lien, and there may come a time when the vessel ceases to be in the use of the state for state purposes, and they can then enforce that maritime lien." [87] "He (the libellant) can, of course, wait and enforce his maritime lien after the vessel has passed out of the service of the Sovereign State. . . ." [88]

There is here to be remarked a striking similarity to the point of view held by the American courts as to the enforceability of a maritime lien—before the decision in the *Western Maid*.[89] This similarity is still further emphasized by the fact that in England this prevailing opinion was also reversed.

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[84] 1920 P. 20, 39, 40. The same doctrine of immunity of ships owned by a foreign government is recognized in Germany (The *Ice King*, Evans Cas. Int. Law, 2ed. 1922, p. 256).

[85] The *Broadmayne*, 1916 P. (C. A.) 64, per Swinfen Eady at p. 70, and per Pickford, at p. 72.

[86] The *Messicano*, 1916, 32 T. L. R. 519.

[87] Hill, J., The *Koursk*, Lloyd's List Newspaper L. Rep. 10/23/17.

[88] The *Crimdon*, (1918) 35 T. L. R. 81. In this case the judge thought the libellant might proceed in personam against the owner, but that the requisitioning state could prevent action in rem.

[89] Ante, pp. 131-134.

The *Tervaete* was being used as a "cargo boat for public purposes" which public purposes consisted in the carrying of coal for freight. At the time of the collision from which the action arose she was owned by the Belgian Government. Later she had been transferred to a private individual against whom the damage caused by the collision was sought to be enforced. The libel was sustained in the lower court. The judge felt that "the immunity of foreign governments from legal process is due merely to the limited extent of the jurisdiction of the court concerned." [90] The acts of foreign states are capable of having juristic effect; it is only where the state sets up its immunity that the court is restrained. The possession of a state does not make the vessel extra commercium, nor is such a ship incapable of becoming subject to obligations that private owners could incur. If a sovereign can sell and convey a ship, it can hypothecate it.[91]

This ruling that a state owned ship was immune, not because the state could do no wrong, but because while in state possession the court was deprived of jurisdiction over the res, was overruled on appeal.[92] Lord Justice Banks agreed that a sovereign was capable of committing a tort, otherwise a set-off would be impossible where the sovereign was plaintiff; but to allow a lien to attach to a ship would lessen its value.[93] Whether a maritime lien was to be regarded as a step in enforcing a claim against the owner of the res, or a remedy in itself, the Justice felt it to be contrary to the rules of international law to allow it to be attached to a "vessel belonging to a sovereign power, and being used for public purposes." [94] Scrutton, L. J., considered that a procedure in rem was not based on any idea of the ship as a wrongdoer, "but is a means of bringing the owner of the ship to meet his personal liability by seizing his property." [95] Then as the "owner at the time the collision occurred could not be impleaded, and as the responsibility was personal, it

[90] The *Tervaete*, 1922 P. 197, 202-203.
[91] Ibid., 206.
[92] 1922, P. 259.
[93] Ibid., 265, 266.
[94] Ibid., 267.
[95] Ibid., 270.

could not be enforced against a transferee." Atkin, J., thought that the damage occasioned could have been the basis of a set-off in a suit by the Belgian government, but that a maritime lien could not be created by the act of a sovereign.[96] The purpose of a maritime lien is to implead the owner, but

> . . . the owner who is a foreign sovereign cannot be impleaded at all. The result appears to me to be that the maritime lien against a foreign sovereign cannot exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied . . . inasmuch as there never was a time during the ownership of the Belgian Government when the respondents could aver that they possessed a maritime lien over the *Tervaete*, there was no obligation which attached to the ship or to the new owner when the ship became their property.[97]

A similar result was reached in the case of the *Sylvan Arrow*,[98] in regard to a requisitioned ship. Here the collision had occurred while the ship was under requisition but the action was brought against the private owner to whom the ship had been released. The ship and owner were held not liable; not on the basis of a juristic construction of sovereignty whereby the state or government is incapable of causing an unauthorized tort, but on well established rules of the English Admiralty law. In the first place, to repeat, English courts do not hold the ship the wrongdoer; nor secondly, is the owner of a vessel liable personally for torts done by his ship when that ship is by operation of law taken out of his control and placed in charge of a man not of the owner's choice.[99] Here the requisition, whether legal or illegal, was held to be by force, compulsion; the control and possession of the vessel was taken from its owner, and with this involuntary (since the government could against his consent have taken the ship, and tacit consent to the inevitable was the easiest way out)[100] termination of control, liability for the acts of the ship ceased also.

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[96] Ibid., 273-274.
[97] Ibid., 274.
[98] 39 T. L. R. 655 (1923).
[99] Hughes, Admiralty, p. 37.
[100] 39 T. L. R. 658.

With this should be contrasted the later case of the *Meandros,*[101] where a ship requisitioned by the Greek government, under its complete control, held at its risk[102] and used to transport troops and refugees, was held liable, after its return to its owners, for salvage services rendered it while under requisition. The court argued that the owners were liable because they had received a real benefit from such services. It is true that if salvage services had not been rendered and the ship had been lost, the Greek government would have been obligated, but then the owners would have had only a claim against the Greek government, which would need to be collected—now they had their ship. "As the result of the salvage they had their ship, and not a claim, and to say that no benefit was derived from the salvage seems to me to be illusory."[103] This bit of realism is refreshing; the customary formula is that the government must be presumed willing to do what is right—a piece of judicial fiction satisfactory to all except the one injured.

It seems that when a government or state descends to the position of an ordinary trader, the mantle of immunity should be dropped. It is certainly a far cry from the usual understanding of the functions of sovereignty, for many years confined to police and the administration of justice, to the operation of tramp ships in competition with business corporations. As long as the sovereign refrained from participation in the ordinary pursuits of everyday life and occupied himself with functions that an ordinary individual could not accomplish, his immunity, though perhaps indefensible, was comparatively innocuous. But if the idea of sovereign functions has changed so as to allow this commercial phase, inconsistent with the old conception, then the equally incongruous idea of exemption should be dropped. Certainly it is not a pleasant prospect to have hundreds of irresponsible ships floating the seas, whose masters may with impunity

[101] 41 T. L. R. 236 (P.) Dec. 17, 1924.
[102] The Greek Government agreed to return the vessel in as good condition as when requisitioned, ordinary wear and tear excepted.
[103] 41 T. L. R. 238.

ignore all maritime regulations. The damage is as great whether the navigator has gold braid on his coat, or is in plain blue. In regard to contracts, the argument is often made that the contractor need not contract with a state if he does not choose; this is manifestly inapplicable in the law of torts, or to collisions, where of necessity the act must be in invitum, or "volenti non fit injuria" would apply.

It is doubtful to the author if sovereign immunity under any conditions can be justified as a practical proposition; it would rather seem that any service, whatever its nature, undertaken on behalf of a group, should be supported by the whole group, not one or a few. When the government or state or whatnot undertakes an ordinary commercial enterprise that any individual can manage, and usually manage better, there would seem to be absolutely no reason for allowing exemption; if the government cannot compete with an individual unless this exemption is allowed, that would seem to be the clearest possible demonstration that the government was not fitted to carry on that particular business. Nor is immunity indissolubly connected with sovereignty; the Treaty of Versailles, Article 281, provides that "if the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty." [104]

Especially where the sovereign's property enters another jurisdiction does it seem arrogant, even insolent, to claim immunities. That the sovereign is treated in any respect as an ordinary plaintiff shows that it could be treated in all respects as such. At least, when the res is within the jurisdiction of a court, it should be able to work complete justice regardless of ownership, provided only that the owner be

[104] The author refuses to accept the doctrine of 'self-limitation' as an explanation for a provision that Germany, if physically able, would have rejected; nor does he feel that because this was forced on Germany, she has ceased to be a 'sovereign' state. No state at present is wholly free in its conduct toward other nations, nor can any state wholly withdraw itself from communion with, and consequent influence by, the rest of the world, the Monroe doctrine or policies of isolation to the contrary notwithstanding.

given an opportunity to appear and defend. The United States has within the month adopted a liberal attitude in regard to the liability of all its ships; this could be done by all nations, or else they are not entitled to operate ships where their operation endangers others. Whether such government owned ships should be subject to arrest, or whether proceedings should be in personam only, is unimportant, being procedural only; the important thing is the recognition of substantive and substantial liability. The present American plan [105] could be accepted by foreign governments in regard to their ships, or an international jurisprudence such as that outlined by the Comité Maritime International at its meeting in London in 1922.[106]

[105] Ante, pp. 136-137.
[106] 1 Am. Mar. Cas. 61.

CHAPTER XII

Theories: Conclusion

In the discussion of the adjudicated cases in which we have been occupied so far, attention has been called to the various theories on which the immunity from suit of the sovereign, State and government has been placed. This concluding chapter will be devoted to a grouping and restatement of these theoretical considerations, and to a brief discussion of their merits and validity.[1]

In England the courts still base this immunity on the maxim that "the King can do no wrong," and on his inability to issue a writ to himself. We have had reason to believe that this immunity originated under the feudal system, and was purely personal to the reigning monarch. It has, however, been carried over to the democratic state, although perhaps "state" is scarcely the proper word to use for the English political organization. Certainly there seems to be no concept of a state person, either juristic or moral, but rather a grouping of services or public functions under the collective name of the Crown.[2]

At any rate, the old dogma of kingly infallibility has been applied to the English political community; the Crown or Government possesses that superiority before the courts formerly enjoyed by the monarch. Of course, now that the King is but little more than a figure-head the literal interpretation that the King can do no wrong is absolutely true; the King can do neither right nor wrong. Now though in political theory the King in Parliament is still sovereign, in reality the people politically organized through their govern-

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[1] Obviously no more than a resumé can be attempted, partly because of the scope of this work, partly because each theory could be made the basis of quite a voluminous article.

[2] Bonnard, De la Responsabilité Civile de Personnes Publiques et de leurs Agents, pp. 16, 17; W. R. Bisschop, British Year Book of International Law, 1922-1923, p. 136.

ment possess and exercise power, so that the exemption from process of the King, Crown or Government is in reality the exemption of the community. The doctrine of immunity in England really amounts to no more than a statement of fact; the Government enjoys immunity because it is recognized that it has such. The explanation or justification is purely and plainly fictitious; government in the name of the king is merely an indication, paralleled in private law, of the typical English tendency to make needed changes in practice, while retaining the old forms.

The effect, however, has not been entirely harmless. When the King was indeed sovereign, when his word was law, his actions might be arbitrary and unjust, but there was no doubt as to the responsible party. Where, however, the fiction of kingly power is retained in a democratic community, there is at least the appearance of an attempt to evade responsibility; to act, but to act in the name of another, and thus escape the need of justifying such acts. Granting that the sovereign power can if it so wills be exempt from judicial process, where the sovereign is a nation it is well for the nation to act in its own name. The idea of a group deliberately exempting itself from responsibility towards its individual members is just as possible, but scarcely as likely, as a similar action by a king toward his subjects. The group concept suggests the idea of equals and equality; the second, a superior and an inferior.

Our English state finds its working embodiment in the Crown; but if we choose to look beneath that noble ornament we shall see vast government offices full of human, and, therefore, fallible men. We choose to ignore them; or rather we know them only to make them pay for errors they have not committed on their own behalf. So do we offer vicarious victims for a state that hides itself beneath an obsolete prerogative.

When we refuse to take the state for what it in fact is, all we do is to make it superior to justice. Responsibility on the part of the Crown does not involve its degradation; it is nothing more than the obvious principle that in a human society acts involve consequences and consequences involve obligations. We are invested with a network of antiquarianism because the conceptions of our public law have not so far developed that they meet the new facts they encounter. We, in a word, avoid the payment of our due

debts by a shamefaced shrinking behind the kingly robe we have abstracted from the living ruler.[3]

If the conception of government as the agent of real, human people, were accepted, it is doubtful if the rules of public law would differ greatly from those of private. Why should a one-man business, a partnership of twenty, a corporation of half a million stockholders treat with an individual as with an equal, but a larger, or in some cases a smaller, group politically organized exempt itself?[4] Not how can the politically organized group exempt itself, for of course the law-makers, the possessors or controllers of power can make any laws they desire—but why should they? At first the law maker was an individual, then a group, but a group in which group activity was confined primarily to matters of justice and police; later and now a group whose activities resemble nothing so closely as those of public service corporations. If once the fact is made clear that the people rule, not the king, then the principles of public law will mirror the actual ethical standards of the nation. Fallible honest men would recognize their fallibility, and provide that injury done to one by the agents of the group, would raise a group responsibility.

What is needed is, in the first place, the conception of the State or the public as a legally responsible person; and, in the second place, the application to this person of the idea of agency in such sort that it shall admit responsibility for the acts of its servants done in its service. . . . This admission of responsibility by the State would not divest its agents of their responsibility. What we should have would be double responsibility of both, instead of sole responsibility of the agent.[5]

In the United States the doctrine of state or governmental immunity was accepted, almost without question, as a natural and fundamental principle of public law; the influence of the old personal irresponsibility of one man was retained in a country where the people were king. The doctrine was early received, without argument or reason, and

[3] Harold J. Laski, Responsibility of the State in England, 32 Harvard L. Rev. 447, 451-452.

[4] See Chisholm v. Georgia, 2 Dall. 420, 472, 1 L. Ed. 440.

[5] E. Barker, The Rule of Law, 2 Political Quarterly 117, 123.

once accepted its existence became an argument in its favor. As there was no one person who corresponded to the king or sovereign it is perhaps difficult to see the applicability of the doctrine in the United States. It was probably accepted as representing the "general doctrine of publicists" that the supreme power in any state should be exempt from the jurisdiction of its own courts.[6]

We do find expressions as to the "wisdom" of exempting the government from suits,[7] of horror at the indignity of subjecting the state to suit,[8] but usually exemption is accepted as an existing fact.[9] Apart from one justification on purely theoretical grounds, the courts, where they have felt constrained to offer any explanation, have affirmed the doctrine of immunity on grounds of "expediency."

> The broader reason (of immunity) is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen; and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.[10]
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> That maxim (the sovereign cannot be sued without his consent) is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defense and general welfare, that the sovereign should not, without its consent, be dispossessed, by judicial process, of forts, arsenals, military posts and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue-cutters, established for the security of commerce with foreign nations and among the different parts of the country. . . . The principle

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[6] Cf. U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 177.

[7] Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010, 1012. The English courts speak indiscriminately of suits against the Sovereign, Crown, government and Executive; the American courts refer to the suability of state or government. As the state can act only through its government, the exemption or submission of the government is to all intents and purposes that of the state. It is doubtful if there is any attempt, except in political theory, to keep separate the ideas of state and government, if indeed they can be dissociated, for a state without a government is a mere concept. The Council of State uses Administration and State interchangeably.

[8] Marshall, 3 Elliott's Debates on the Federal Constitution, 2 ed. 555-556.

[9] Chap. V.

[10] Briggs v. Lightboats, 11 Allen (Mass.) 157, 162.

is fundamental, applies to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created.[11]

These arguments comprise questions of expediency, that is, of fact, and really involve a consideration of the purposes of state and government. Now if society is politically organized that each may lead a fuller and more prosperous life than an unorganized condition would allow; if the promotion of justice is a function and justification of government in the abstract,[12] it is difficult to see how justice is to be furthered by its denial on the part of the very body or organism that is entrusted with its administration. If the individual has no protection from his fellow members of society, in what respect would he be worse off in an unsocial state? The "common defense and general welfare" that for the purpose of preventing aggression from the outside requires oppression from within allows its victim merely the choice between two robbers. He may be no worse off than in an unsocial world; but his condition is little better.

If the only argument against the suability of the state and government is the theory that such submission to jurisdiction would render the government "unable to perform the various duties for which it was created," each judge could decide for himself in each particular case what these duties were, and whether in fact they would be impeded by the suit. It would not be difficult to imagine the institution of suits to compel the government to perform its duites; every suit asking relief against governmental action could be framed to present that character. Expediency being relative to time, place and circumstances, the argument that the state or government is immune because it is inexpedient to subject it to suit can be considered as no more than the opinion or interpretation of existing facts by the party advocating exemption; another might from the same set of facts arrive at diametrically opposite conclusions. Doctrines of expediency

[11] U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 172, 184 (dissent).
[12] Christie Street Com. v. U. S., 136 Fed. 326, 330.

acknowledge that there is no inherent reason why the state or government, per se, should enjoy exemption.

A century and a quarter after the formation of the Republic, and after the theory of sovereign immunity had been accepted by the courts as an existing fact to be recognized rather than explained, an attempt was made to justify it upon purely logical grounds. The doctrine of immunity originated as a physical fact, was accepted and applied without attempts at justification; now, as is so frequently the case with customs that have grown up and long existed without examination or question, an ex post facto justification is attempted on theoretical grounds of a matter that, like Topsy, just grew.

> Some doubts have been expressed as to the source of immunity of a sovereign power from suit without its own permission, but the answer has been public property ever since before the days of Hobbes. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy." . . .[13]
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> Also we must realize that the authority that makes the law is itself superior to it. . . . Sovereignty is a question of power, and no human power is unlimited.[14]

This theory, however, attains its validity by its own statement of premises; the sovereign, by definition, is exempt from his own laws.[15] Of course, if as the opinion indicates, we are to make legislation a matter of power, the strongest, whether an individual or a group, can obtain its way, and can determine the content of "law." But here again a matter of definition is involved; if law is a command from a superior to an inferior, the superior is not subject to his own command. But it is possible to conceive of, or define, law in a different manner. Law may be merely a rule of conduct generally followed as a result of consent or custom; it may be the mere

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[13] Kanawanakoa v. Polyblank, 205 U. S. 349, 353, 51 L. Ed. 834.
[14] The *Western Maid*, 257 U. S. 419, 432, 66 L. Ed. 299. Opinions by Justice Holmes.
[15] The *Pesaro*, 277 Fed. 473, 475.

rules of organization of public services.[16] If the state is conceived of merely as humans politically organized, then a reciprocal spirit of give and take, and agreement by each that he will obey the group rules, the consideration of which is a similar agreement of all others, could create a system of law—general rules of conduct.[17] There is no logical necessity that any group should decide that it as such should be governed by rules differing from those it establishes regulating the relations of its members inter se; it may be that such would be done, but there is no categorical imperative so requiring. It is only if the State is considered as something apart from, superior to, those who compose it, that ex necessitate it will not be bound by its own rules.

But even if the State is accepted as sovereign, as a law giver; the superior issuing commands to the inferior which bind the inferior alone, another question remains. Granting that the state cannot be sued without its consent, why, in the absence of a clear and unmistakable expression to the contrary, should the state be presumed to desire such an exemption; would it not be more reasonable to suppose that, unless it indicates otherwise, the state intended that it should be bound by the rules it has issued for the governance of its subjects? The fact that immunity from suit can be waived shows that submission to suit is not in and of itself inconsistent with sovereignty; why then should not this waiver be presumed? If the rules the state has promulgated determining the relation of groups within the state, even large groups, to individuals, are just, then they would be similarly just when applied between the largest group, the state itself,

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[16] Duguit, Law in the Modern State. "The administrative act is no longer the act of an authority that orders; it is the act of a functionary who carries on a service. . . . Law is no longer the command of the sovereign state; it is the statute of a service or of a group." Duguit, Les Transformations du Droit Public, 1913, p. 280). "Divine right, social will, national sovereignty; so many valueless words, so many sophistries by which the governing wish to delude their subjects and often delude themselves" (Quot. by Tirard, De la Responsabilité de la Puissance Publique, 118).

[17] Franz Oppenheim, The State, pref. vii.

and individuals. There is nothing in political organization that changes the nature and characteristics of the individuals forming that organization. If rules are found desirable for the regulation of the relations of these people organized in other groups, to each other, there is equally as great need where the organization is political. In the absence of plain provision to the contrary, the sovereign could and should be considered as consenting to the application to it of the rules that it has enacted for the regulation of others.

In France the theory of state irresponsibility has been vigorously attacked by the text writers, and quite as vehemently by the government commissioners before the Council of State and Tribunal of Conflicts. As a result, responsibility is recognized except in cases of pure legislation, judicial acts, and foreign relations. The French emphasize the feudal origin of the idea of irresponsibility and deny its present applicability; theories useful or applicable at the time of their origin may become antiquated, and when such happens, should be discarded. In a discussion before the Senate in 1895, M. Berlanger well expressed the idea. "The alleged doctrine of the infallibility of the state, of its irresponsibility, is no longer of our times; it is a feudal thesis, and I regret to see it approved by the government." [18]

Equally as emphatic were the government commissioners Teissier and Romieu in their conclusions submitted to the Council of State. Teissier spoke of irresponsibility as:

> . . . the doctrine of the jurists of the old monarchy which, in the final analysis, goes back to a presumption of the infallibility of public authority (puissance publique), a presumption which fitted well enough with the theory of divine right. The persistence of this general irresponsibility of the Administration, which is explicable as a sort of adventitious force, evidently cannot, with the progress of the idea of justice in the course of the last century, be maintained in all its rigor.[19]

In another case M. Romieu condemned state irresponsibility, for, as it was "derived from the old conception of the

[18] Quoted by Tirard, op. cit., p. 1.
[19] Le Berre, Sirey, 1904, 3, 121.

irresponsibility of the royal power, it is no longer in harmony with the modern ideas of law." [20]

The historical development of the concept of sovereignty and irresponsibility in France is merely illustrative of the normal course it has taken generally.[21] In every period of history, the governing feel constrained to reinforce their position, actually held by force, by an appeal to authority; they seek to legitimate the possession of that which they hold by a precarious tenure. Usually this is done by an appeal to Divine sanction; the governors exercise not their own, but a divinely delegated authority; they are but organs of a superior will. In France this was achieved; the all-powerful King was irresponsible, because the temporal representative of the Supreme Being.

> The dogma of the irresponsibility of the sovereign thus justified by the divine origin of the royal power, is in reality but the natural consequence of the autocratic regime. The Revolution transformed the political and social order, but the theoretical concepts of the royal jurists have been conserved by the modern legislators and jurisconsults who have been content to modify them and adapt them to the new order. They transferred sovereignty from the king to the people, and have made the sovereignty national, but they have conserved its quasi-divine character. They have continued to see in the exercise of sovereignty the putting to work of a superior power, which escapes by reason of its metaphysical essence, from all restraints (voie) of law.[22]

In France the irresponsibility of the state, at least as regards administrative acts in the carrying on of the public services where operation, rather than law-giving was evidenced, was restrained by conceiving of the state as a moral person (personne morale) in regard to these activities, and responsible as an ordinary person for the acts of its agents, if reasonably within the scope of their authority. The state as a moral person had for its organs humans; its will was the will of humans, but while it was not a "real" person, it was not purely fictitious; it had a legal will "constituted by the combined will of its representatives or organs, mani-

[20] Zimmerman, Sirey, 1905, 3, 17.
[21] Remainder of paragraph follows Tirard, op. cit., 114-119.
[22] Tirard, op. cit., 117-118.

festing themselves in certain forms and moving in the circle of actions, in view of which" they were constituted.[23] These individual personalities were merged in that of the state person, that this moral person alone might appear in relations with third parties.[24] Consequently these representatives, as long as they do act as representatives or organs of the moral person, have no responsibility of their own; the state acts and wills through its agents; when they act and will it is the state that acts and wills.[25] If then these agents commit, within their representative capacity, a fault, it is the state that has committed the fault, which is directly imputable to it, and for which this moral person, just as a physical person, is directly and personally responsible. "To say . . . that the moral person has not given its representative the order to commit a fault, and in consequence, the latter ceases to be its representative when he commits a fault" is sophistry. "From the moment that the law recognizes a will, this will can travel between good and bad, legal and illegal, without ceasing because of that to be (the will) of the moral person."[26]

Being capable of a fault, the ordinary rules of principal and agent apply[27]; so long as the agent acts as the representative of the moral person, that is, so long as the agent acts on behalf of the public service, he binds the moral person by his acts, whether right or wrong. It will be seen that this is the basis of, or is deduced from, the fault of service and personal fault theories.

But for some reason that is not altogether plain, the state, according to this theory, has a dual personality,[28] or a single personality with a dual aspect[29]; but it is also a sovereign, and when acting as such (particularly in acts of legislation,

[23] Michoud, Responsabilité de l'Etat, 3 Rev. Dr. Pub. 401, 416.
[24] Ibid., 418.
[25] Ibid., 419.
[26] Ibid., 418.
[27] Ibid., 419.
[28] Michoud, 4 R. D. P. 1; 251.
[29] Hauriou, Droit Administratif et Droit Public, 7 ed. p. 106 ff., 212 ff.

and in the older theory, in administration also when the act was an 'acte d'autorité') is irresponsible. Duguit characteristically describes this theory as "an ingenious fiction imagined by subtle jurisconsults to reconcile the responsibility of the state with a juridical system in accordance with which it can have responsibility only where there is a conscious and volitional personality." [80]

This 'fault' theory, or at least its effects, has met a reception in the Council of State that is logical and to be expected. At first, when the idea of state responsibility was new and startling, the Council recognized that even administrative acts could partake of the attributes of irresponsibility; that certain acts of Administration were acts of "authority," and removed from its cognizance. This distinction was soon abandoned and responsibility was recognized for all administrative acts (but not legislative or diplomatic) where a fault of the service could be discovered. This latter stage corresponded to the idea of the state as a moral person; if officers acted as officers, even erroneously, the state was liable for this fault of service; if the officer acted not as an officer but as an individual—if his action was solely personal to him—it was his act, not that of the moral person, and entailed his responsibility, not its. The next step, as the idea of responsibility now seemed natural, not impossible, was to eliminate, at least in some cases, the idea of fault as the basis of liability; to hold the state for injury caused by the execution of its various functions, even though no fault could be shown. This has not yet destroyed the idea of "faute personnelle" in its entirety, but does frequently even where the fault is personal entail the responsibility of the state and leave it an action against the offender.

This last stage is the result of rationalizing the state; instead of a sovereign giving commands "the public power should be, we think, today envisaged in an aspect more practical and modest; the state is but an administrative organization destined to allow a group of individuals, who constitute

[80] Duguit, Les Transformations, p. 230.

the nation, to prosecute, better, their political and economic aims." [31] "The responsibility of the state is recognized in a general manner, but it is not at all the responsibility of a person for fault; it is the assurance by the collective patrimony against the risks which the functioning, even the regular functioning, of the public service constitute for individuals." [32]

The idea is insurance against the social risk; the equalizing of burdens among those who profit by the services giving rise to those burdens.[33] The state is no longer an end in itself; it is but a means, one means, to an end; to the better organization of public service. No longer does a mystical, transcendental state give commands in accordance with which public utilities are organized; instead, fallible human beings have associated, and selected as their agents equally fallible human beings to carry on for the public good enterprises essentially of a public nature. If this public work causes injury through faulty operation, that is one of the expenses of carrying on the enterprise, and is as much a cost of the service, to be borne by those benefiting from the service, as is the salary of officials. If the normal operation of this service causes an unusual burden to an individual or a small group, this also is one of the expenses for which provision must be made. Man, the social creature, has come to realize that community action means community responsibility; that state irresponsibility is a convenient name for individualistic dishonesty, that throws on one a burden incurred through the operation of a necessary public service.[34]

[31] Tirard, op. cit., p. 120.

[32] Duguit, Les Transformations, p. 280.

[33] It would be just as reasonable to put all the taxes on one person or a few chosen by lot, as to require those accidentally injured by government operation to bear the whole expense of that injury.

[34] The author is well aware that through the whole discussion of the French system the jurist has been saying, Yes, perhaps, but after all the state is still sovereign, for it created the Council of State and gave it its powers. Also, under the doctrine that what the sovereign allows, he commands, this action of the Council merely expresses the state will. (This of course applies in connection with a state that is something more and different from a

On the Continent the tendency to hold the state to the same responsibility as individuals in money and property affairs, in commercial enterprises, is quite pronounced. In Prussia [35] this had been, and in Switzerland [36] is, the result of legislation; in Italy the code recognizes but does not create this responsibility [37] in Belgium [38] and Spain,[39] it is part of the common law. Those countries where the civil law is in force, then, have been far more liberal in checking state irresponsibility than those that owe their legal systems to the English common law. This has undoubtedly been due, in part at least, to the fact that the Continental governments engaged far more freely in the operation of ordinary commercial enterprises; a distinction that is now losing its validity.

Of the English speaking countries, Australia has gone the greatest distance in the recognition of governmental liability; apparently any claim may be prosecuted against the government under the same rules applicable to suits between individuals. "All necessary judgments, decrees and orders may be given and made, and shall include every species of relief, whether by way of specific performance or restitution of rights for recovery of lands or chattels, or payment of money or damages." If a judgment is not paid, execution may be levied on any government property.[40]

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mere collectivity of people). Now of course the obvious, practical question is, why did the sovereign state change its mind so rapidly, and without any change on the statute books, the usual method of state expression? The state could, of course, annul the interpretations of the Council of State, hence it is still sovereign. But what does this really mean? Simply this; the state can act only through agents, human agents, whether called the government, the Crown, or whatnot; and these human agents really take their orders from humans; from themselves, if strong enough; if not, from the articulate nation. Then if the Council of State changes its jurisprudence, either sua sponte, or as the result of legislation, it is simply because it reflects, as a mirror, the social morality of the then possessors of power—whether a single man, the electorate, or the nation.

[35] Brown v. U. S., 5 Ct. Cl. 571.

[36] Lobsiger v. U. S., 5 Ct. Cl. 687.

[37] Fichera v. U. S., 9 Ct. Cl. 254, 256.

[38] De Give v. U. S., 7 Ct. Cl. 517.

[39] Molina v. U. S., 6 Ct. Cl. 269.

[40] Farnell v. Bowman, L. R. 12 A. C. 643, 56 L. J. P. C. 72, 57

In the reorganization of some of the European governments that occurred after the War, and in the newly organized states, care was taken that the rights of the citizens against state and governmental action should be well protected. The customary method was to place the doctrine of responsibility in the constitution itself, though frequently providing that future legislation should fill up the details.

Austria provides that all persons entrusted with administrative or judicial functions, whether Federal, State or municipal, shall be liable for any injury inflicted upon a third person through intentional or grossly negligent violation of law in the exercise of their functions. The Federal State, States and municipalities are liable for violations of law by those in their service.[41] Provision is made for a "Supreme Constitutional Court" which shall have jurisdiction of all claims against the Federal State, the States or municipalities over which the competence of the regular courts does not extend.[42]

Czechoslovakia gives the ordinary courts jurisdiction over all private property claims as to which the citizen is dissatisfied with the decision of the administrative authorities.[43]

The Jugo-Slavian constitution provides that:

> Art. 18. Every citizen has the right directly and without any one's approval to bring complaint to the court against the government or self-governing bodies for criminal acts which they may commit against him in their official capacity. For ministers, judges, and soldiers under colors, special provisions apply. For damages done to citizens by governmental or self-governing bodies by illegal performance of their duties, the government or self-governing bodies are responsible before the proper court. The agent in question is responsible to them. . . .[44]

L. T. 318, sustaining action for damage from fire caused by negligence of officers. In the course of the case, after discussing the necessity of such legislation in the colonies, where government operation of public utilities is frequent, the court made an unconscious admission. "If, therefore, the maxim that 'the King can do no wrong' were applied to Colonial Governments, . . . *it would work much greater hardship than it does in England*" (57 L. T. 319. Italics mine).

[41] McBain & Rogers, The New Constitutions of Europe, p. 263.

[42] Ibid., 288.

[43] Ibid., 330.

[44] Ibid., 352-353.

Art. 91. For damages done by ministers, by unlawful acts, the state is responsible.[45]

Germany established a system of administrative courts both in the Reich and in the states, to protect individuals against the ordinances and decrees of the administrative authorities.[46] In addition, the state is made responsible for the action of its servants, who in turn are responsible to the state.

Art. 131. If a civil officer in the exercise of the authority conferred on him by law fails to perform his official duty toward any third person, the responsibility is assumed by the state or public corporation in whose service the officer is. The right of redress (by the state or public corporation) against the officer is reserved. The ordinary process of law may not be excluded.[47]

Poland has made extremely liberal provisions; the constitutional section dealing with responsibility could well be followed by other countries.

Art. 121. Every citizen has the right to compensation for damages inflicted upon him by civil or military organs of state authorities, by an official act not in accordance with the right or duties of the service. The state is responsible for the damage, jointly with the guilty organs; action may be brought against the state and against officials, independently of any permission by a public authority. Communes and other self-government bodies, as well as their organs, are responsible in the same manner.[48]

With the scope of governmental activity rapidly being enlarged, the old idea of the state functions, confined in the past to the administration of justice, the preservation of internal order, and insurance against external aggression, has become obsolete. So also it would seem, from the theory and practice of many nations, has the doctrine of state irresponsibility become equally outworn. It matters little to one who is injured by state activities whether he is compensated through a law that represents an act of auto-limitation by the state, or whether it is from general principles of equity, or from a theory denying the sovereignty of the state; so it is of small satisfaction to one whose injury is uncom-

[45] Ibid., 364.
[46] Ibid., 197.
[47] Brunet, The New German Constitution, p. 327.
[48] McBain & Rogers, op. cit., 423.

pensated, to know that he is offered as a sacrifice on the altar of a logically invulnerable political theory. But a few years ago workmen's compensation laws even in private business were unheard of; the worker assumed the risk. The next development may be in the realm of public law; insurance against the social risk, the premiums of which will be paid by the risk creator—Society.

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